84-1841

No. 84-

Office - Supreme Court, U.S.
FILED
MAY 22 1985
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

METHODIST HOSPITAL OF BROOKLYN, ACCIDENT PREVENTION & SAFETY LEAGUE, INC., and NAGEL, INC.,

Appellants,

— against —

THE STATE INSURANCE FUND, MARTIN A. FISCHER, EASTMAN BIRKETT, LOUISE COSTE, CHARLES G. MOERDLER, ALBERT C. TODARO, RIVKA CHATMAN, BART DI MATTINA, JAMES H. SCHOLTZ, and LILLIAN ROBERTS, as Commissioners of the State Insurance Fund; JUSTIN SCHULMAN, as Supervising Actuary of the State Insurance Fund; EDWARD V. REGAN, as Comptroller of the State of New York; the Commissioner of Taxation and Finance of the State of New York; and THE STATE OF NEW YORK,

Appellees.

ON APPEAL FROM THE
COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

HAROLD EDGAR
1158 Fifth Avenue
New York, New York 10029
(212) 427-5977

ROBERT B. DAVIDSON*
ABIGAIL T. REARDON
BAKER & MCKENZIE
805 Third Avenue
New York, New York 10022
(212) 751-5700

Attorneys for Appellants

* *Counsel of Record*

QUESTIONS PRESENTED

1. Whether a state statute directing the transfer of money from a State Insurance Fund, created "for the purpose of insuring employers against liability" and "of assuring" injured workers their compensation, which Fund contains no money but that collected for insurance purposes, impairs the obligation of a statutory contract to maintain the Fund in trust and constitutes a taking without due process of law of the property of those who paid into the Fund to secure insurance.

2. Whether a state law taking funds directed by prior statutes to be held separate and apart from general state funds, and to be applied to insurance liabilities, impairs the obligation of insurance policy contracts issued by a State Fund and purchased by Appellants in reliance on the security afforded by a separately maintained Fund.

3. Whether the Court below ignored the principle that the "obligation of contract" includes contemporaneous state laws with reference to which contracts are written, and unconstitutionally required that such laws operate as independent promises in their own right.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. Introduction	3
B. Appellants' Claims	5
C. Background of the State Insurance Fund	7
D. State Insurance Fund Legislation	9
E. The Insurance Policy	10
THE QUESTIONS PRESENTED ARE SUBSTANTIAL	13
I. THE IMPAIRMENT OF THE OBLIGATION OF APPELLANTS' INSURANCE CONTRACTS RAISES A SUBSTANTIAL FEDERAL QUESTION	13
A. Surplus	16
B. The State's Liability	16
C. Policy Subject to Statutory Changes	18
II. CHAPTER 55 IMPAIRS THE STATE'S CONTRACTUAL OBLIGATION TO MAINTAIN THE STATE INSURANCE FUND AS A TRUST	19
A. New York Precedents	19
B. State Funds in Other Jurisdiction	21
C. This Court's Heightened Review	22
D. Conclusion	23
III. CHAPTER 55 TAKES APPELLANTS' PROPERTY WITHOUT DUE PROCESS OF LAW	24
CONCLUSION	25

TABLE OF AUTHORITIES

Cases:	Page
Allied Structural Steel v. Spannaus, 438 U.S. 234 (1978)	14, 22
American Insurance Assoc. v. Chu, 64 N.Y.2d 379 (1985)	17, 23
California Teachers Assoc. v. Cory, 155 Cal.App.3d 494 (1984)	22
Decker v. Amalgamated Mutual Casualty Inc., 35 N.Y.2d 950, 365 N.Y.S.2d 172 (1974)	17
Dole v. Dow Chemical Co., 30 N.Y.2d 143, 331 N.Y.S.2d 382 (1972)	11, 12
Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978)	17
Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983)	18, 22
Green v. Biddle, 8 Wheat 1 (U.S. 1923)	13
Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 100 (1938)	19
Ives v. Southern Buffalo Railroad, 201 N.Y. 271 (1911)	7
Keene Corp. v. Ins. Co. of North America, 667 F.2d 1030 (D.C. Cir. 1981)	12
Lockheed Aircraft Corp. v. United States, 460 U.S. 190 (1983)	11
Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)	24
Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978)	12
Lynch v. United States, 292 U.S. 571 (1934)	14, 18

	Page
Mason v. Cronk, 125 N.Y. 496, 503 (1891)	15
Methodist Hospital of Brooklyn, et al. v. State Insurance Funds, et al., 64 N.Y.2d 365, 486 N.Y.S.2d 905	2
National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co., ____ U.S. ____, 53 U.S.L.W. 4285 (1985)	22
Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977)	6
United States Trust Co. v. New Jersey, 431 U.S. 1 (1977)	13, 14, 15, 18, 20, 22, 23
Valdes v. Cory, 139 Cal.App.3d 773 (1983)	22
Velez v. Feinstein, 87 A.D.2d 309, 451 N.Y.S.2d 110 (1st Dept. 1982)	24
Von Hoffman v. City of Quincy, 4 Wall. 535 (1867)	13
W.B. Worthen Co. v. Kavanaugh, 295 U.S. 56 (1935)	14
Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 15 (1980)	24
Wein v. Levitt, 42 N.Y.2d 300 (1977)	20
Provisions of the United States Constitution:	
Article I, Section 10	1, 2, 14
Amendment V	1, 2
Amendment XIV	1, 2

	Page
Provisions of the New York State Constitution:	
Article I, Section 18	7
State Statutes:	
N.Y. Workers' Compensation Law § 50 (1984-85)	7
N.Y. Workers' Compensation Law § 53 (1984-85)	9, 11, 12, 16, 17
N.Y. Workers' Compensation Law § 76 (1984-85)	9, 10, 16, 17, 19, 24
N.Y. Workers' Compensation Law § 77 (1984-85)	10
N.Y. Workers' Compensation Law § 85 (1984-85)	9
N.Y. Worker's Compensation Law § 86 (1984-85)	10, 16
N.Y. Workers' Compensation Law § 87 (1984-85)	9
N.Y. Workers' Compensation Law § 87-f (1984-85)	4, 5
N.Y. Workers' Compensation Law § 89 (1984-85)	5, 8, 16
N.Y. Workers' Compensation Law § 90 (1984-85)	10, 24
N.Y. Workers' Compensation Law § 91 (1984-85)	4
N.Y. Workers' Compensation Law § 99 (1984-85)	10
N.Y. State Finance Law § 70	20
Chapter 674, L.1910	7
Chapter 816, L. 1913	7
Chapter 41, L. 1914	7, 8
Chapter 55 L. 1982	*passim*
Chapter 404, L. 1982	2, 4

Page

Federal Statutes:

33 U.S.C.§ 903 ..... 6, 9

28 U.S.C. § 1257 ..... 2, 7

Other Authorities:

66 Op. Atty Gen. Md 56 (1981) 22

Appleman *Insurance Law and Practice*, § 4592 (1979) 21

Williams, *Insurance Arrangements Under Workmen's Compensation*, U.S. Dep't of Labor, Wage & Labor Standards Admin. Bulletin 317 (1969) 8

Larson, *Third Party Actions Over Against Workers' Compensation Employer*, 1982 DUKE L.J. 483 11

No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

METHODIST HOSPITAL OF BROOKLYN, ACCIDENT PREVENTION & SAFETY LEAGUE, INC., and NAGEL, INC.,

Appellants,

— against —

THE STATE INSURANCE FUND, MARTIN A. FISCHER, EASTMAN BIRKETT, LOUISE COSTE, CHARLES G. MOERDLER, ALBERT C. TODARO, RIVKA CHATMAN, BART DI MATTINA, JAMES H. SCHOLTZ, and LILLIAN ROBERTS, as Commissioners of the State Insurance Fund; JUSTIN SCHULMAN, as Supervising Actuary of the State Insurance Fund; EDWARD V. REGAN, as Comptroller of the State of New York; the Commissioner of Taxation and Finance of the State of New York; and THE STATE OF NEW YORK,

Appellees.

ON APPEAL FROM THE
COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Appellants appeal from the final order of the Court of Appeals of the State of New York dated February 21, 1985 which upheld the constitutionality of Chapter 55, Section 92.2 of the Laws of New York of 1982 against Appellants' claims based on Article I, Section 10 of the United States Constitution and on the Fifth Amendment as made applicable to the States through the Fourteenth Amendment.

OPINIONS BELOW

The decision of the Court of Appeals is reported at 64 N.Y.2d 365, 486 N.Y.S.2d 905. The decision of the Appellate Division, First Department is reported at 102 A.D.2d 367, 479 N.Y.S.2d 365. The decision of the Supreme Court, New York County, is reported at 117 Misc.2d 178, 459 N.Y.S.2d 521. These decisions are printed in Appendix A.

JURISDICTION

Appellants brought this action in the Supreme Court of the State of New York, New York County, seeking a declaration that Chapters 55, Section 92.2 and Chapter 404 of the Laws of New York of 1982 contravene the Contract and Due Process Clauses of the United States Constitution, and various provisions of the New York State Constitution. The decision of the Court of Appeals was filed on February 21, 1985. No rehearing was sought. The decision of the Court of Appeals is final. The Notice of Appeal, which appears in the Appendix, was filed in the Court of Appeals on May 17, 1985 and in the Supreme Court, New York County, on May 20, 1985.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 10 of the United States Constitution provides, in pertinent part:

> [n]o State shall . . . pass any . . . law impairing the obligation of Contracts . . .

2. The Fifth Amendment to the United States Constitution, made applicable to the States through the Due Process Clause of the Fourteenth Amendment, provides, in pertinent part:

> No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. Chapter 55, Section 92.2 of the Laws of New York of 1982 provides:

> Notwithstanding any other provision of law, the State insurance fund and all state officers with responsibility for custody or investment of such fund or its assets, are authorized and directed to transfer one hundred ninety million dollars to the general fund by March first, nineteen hundred and eighty-three.

4. Additional statutory provisions involved, including provisions of the New York Workers' Compensation Law (hereinafter "WCL"), are collected in Appendix B.

STATEMENT OF THE CASE

A. *Introduction*

This case concerns Appellants' rights as policyholders in New York's State Insurance Fund, one of the eighteen such funds established in various states to enable employers to secure workers' compensation protection for their employees. The decision below approves in New York what every other jurisdiction to consider the issue has disapproved: a statute transferring, to the State's general revenue accounts, state insurance fund assets contributed entirely by insured employers and held to assure payment of claims to injured workers.

The statute, Section 92.2 of Chapter 55 of the Laws of New York of 1982* directed the transfer from the Fund of $190 million to the State's general fund.

Other provisions of Chapter 55 grant legal immunity to those who carry out the command of Section 92.2. They further contain an elaborate fiscal gimmick, a "dry appropriation," by which the State each year appropriates $190 million back to

---

* Chapter 55, L. 1982, Section 92.2 is set forth in its entirety above and in Appendix B. As an appropriations bill, it is not codified. It is hereinafter referred to as Chapter 55.

the Fund, but does not pay it if the following year's budget includes yet another such promise, also never to be paid. The legislation further directs that these successive empty promises be "deemed an admitted asset of the State Insurance Fund."* Chapter 404 of the Laws of New York of 1982 made the first such "dry appropriation," directing that none of the funds be spent save in the event of the State Insurance Fund's insolvency.

Appellants are three New York employers who insured with the State Insurance Fund against workers' compensation and employer liability hazards.** Appellants exemplify the various ways of insuring through the Fund: in the general risk category; as a separately organized group under § 91 of the WCL, in effect a mutual insurance company within the Fund; and through a retrospective rating plan, in effect a form of self-insurance.

Appellants brought this suit in the Supreme Court of the State of New York against the State Insurance Fund, its individual commissioners and executives, the Comptroller and the State. The defendant State Insurance Fund and its individual commissioners joined with Appellants in urging the State Supreme Court to declare Chapter 55 unconstitutional.

The Supreme Court of New York dismissed the action, relying heavily on the presumption of constitutionality that attaches to all New York legislation. The Appellate Division affirmed the dismissal, with one justice dissenting. The Court of Appeals affirmed, holding that the WCL did not give Appellants contractual or property rights in the transferred funds, and that the monies paid to the Fund as premiums were the State's monies for all purposes. The Court also concluded that the State itself was liable for State Insurance Fund debts.

---

* WCL § 87-f.

** Once an employer insures with the Fund, the insurance renews annually unless the employer gives notice of withdrawal. Policies cannot be cancelled by the Fund except for non-payment of premiums. WCL § 94.

B. *Appellants' Claims*

The State Insurance Fund was created in 1914 as a necessary adjunct to the workers' compensation law. The only assets of the Fund are the insurance premiums collected from insured employers, including Appellants, and the interest and investment income earned on the premiums. None of these assets were contributed by the State or its taxpayers. The statutory scheme in effect since 1914 requires that insurance premiums and income in the Fund are to be kept separate from the general funds of the State of New York, and can be used only to pay for insurance claims and administrative expenses. Assets in excess of what is needed for this purpose are directed to be rebated to the insured employers in the form of dividends, pursuant to a command to provide insurance at the "lowest possible rates." WCL § 89.

The legislation before this Court did not redesign and redraft this insurance plan. It simply removed most of the Fund's assets not specifically reserved for the compensation of claims;* granted immunity to Fund officials who might otherwise have found reason to resist the legislation's command;** and created a fiscal gimmick to conceal the fact that by fiat and without a hearing, the bargain struck by countless employers and their

---

* The $190 million was taken from Fund accounts that are classified as "surplus," not as reserves. Surplus does not mean, however, "unnecessary for insurance purposes." The Fund has no legal authority to hold unnecessary balances under § 89. Surplus refers to a cushion for the absorption of above-average losses. A litmus test of an insurance company's solvency is the ratio of its net premium to adjusted surplus. Under even a liberal view of the "Kenney Rule" when the ratio is greater than 3:1, solvency is in jeopardy.

In 1981, the Fund had some $245 million in "surplus" accounts protecting against catastrophe and fluctuation in the value of securities it held as reserves, as well as working capital. Chapter 55 took $190 million of this. Were it a private carrier that could not "deem" 190 million present, the Fund would not be allowed to write new insurance.

** Chapter 55 § 87-f Laws of New York of 1982, codified as WCL § 87-f(2) deems the $190 million transfer "a proper and prudent legal undertaking . . . notwithstanding any other provision of law to the contrary."

employees for 70 years was being undermined because the State wanted the money.

Appellants contend that Chapter 55 has resulted in three distinct injuries cognizable by this Court under the Contract and Due Process Clauses:

1. Appellants chose to use the State Insurance Fund, instead of contracting with private insurance carriers. They acted with reference to the program described by statute. The monies in the Fund are the principal security for this insurance undertaking. The State has no clear contractual obligation to pay the Fund's debts. The Court did interpret current law to require the State to pay the Fund's debts and to release the insured employer from liability the Fund insured, but it did not explicitly term this a contractual undertaking on the State's part, and it did not explain, nor could it, how New York laws can "release" employers' obligations enforceable under Federal and out-of-state laws.* Moreover, in view of the State's sovereign immunity from suit save in the Court of Claims, no mechanism exists by which the Fund's duty to come to the legal defense of insured employers can be enforced effectively. In Chapter 55, the State of New York has abridged its obligation under the insurance contracts.

2. By statute, Appellants were promised that the State Insurance Fund would be held in trust for them and their employees. Now Chapter 55 declares that the trust assets may be diverted to general state use. The obligation to maintain the Fund in trust is impaired.

3. The State Insurance Fund contract anticipated that Appellants' property would be held separately and that successful observation of health and safety rules, even if an additional expense, would be rewarded by reduced insurance premiums due

---

* For example, the Fund writes policies under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 903. In that connection, it has appeared in this Court. *See, e.g., Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977).

to the interest and investment income earned by Fund assets not needed to satisfy compensation claims. Solely as a result of the diversions of Fund assets by Chapter 55, Appellants can now anticipate paying higher premiums each year. In taking funds held in trust for these purposes, the State of New York has taken their property without due process of law.

C. *Background of the State Insurance Fund*

Appellants' contentions depend on an understanding of the statutory insurance program under which employers in New York State have operated for seventy-one years. The State Insurance Fund is a New York institution as old as the Workers' Compensation Law itself. The Fund began operation in 1914, when after initial judicial frustration New York passed an effective workmen's compensation law.*

From the start, the Fund functioned as a necessary feature of a compulsory insurance program. Through it, any employer can meet the responsibilities imposed by New York law** to provide security for the payment of scheduled compensation awards for work-related injuries to employees. Having required employers to insure against their liability for workers' compensation payments, the State sought a means by which the duty could be met. In addition, the Fund's service role is a public one, as an agency that might work actively and cooperatively with employers in high risk employments to lessen their hazards.

---

* New York's first workmen's compensation law was adopted in 1910 (Chapter 674, Laws 1910), and declared unconstitutional, on due process grounds, in *Ives v. Southern Buffalo Railroad*, 201 N.Y. 271 (1911). The decision was not reviewable in this Court under 28 U.S. Section 1257, as it then read, because the Federal claim had triumphed below. A State Constitutional Amendment, N.Y. Const. Art. 1, Section 18 cured the due process problem in 1913 by specifically authorizing a workman's compensation program. Chapter 816 of the Laws of 1913 passed the basic workman's compensation statute; it was reenacted by Chapter 41 of the Law of 1914, because of concern about the operative date of the constitutional amendment.

** WCL § 50.

The Fund had and has another function different from its role as insurer of last resort. It serves as a competitive check on the practices of other insurance companies by providing a publicly-run, non-profit alternative to private stock or mutual companies.* To this end, it is obliged by law (WCL § 89) to provide insurance at minimum cost. Because it must take the risks no one else wants, its ability to attract the large volume of business necessary to spread administrative costs, and thus to provide low-cost insurance to the mass of employers, fulfilling its competitive function, is compromised. Particularly in the early days, when workers' compensation was a novelty, the State's established firms might resist insuring with a Fund pledged to pay the losses incurred by the State's worst risks, especially so since the Fund, as first constituted, included an explicit declaration that the Fund "shall be administered . . . without liability on the part of the state beyond the amount of such fund." Chapter 41, Section 90, Laws of 1914.**

The Workmen's Compensation Law sought to overcome this possible resistance by providing as a competitive advantage

---

* There were many who wished the Fund to be the *exclusive* vehicle for workmen's compensation insurance beause they feared that private insurance carriers would frustrate legitimate claims by resort to the delays and hypertechnical obfuscation that had sometimes characterized insurers' discharge of duty under common law employer liability policies. Arguments of the insurance industry, however, carried the day in New York and the State established the Fund as a competitive insurance carrier.

** The specific limitation of liability was repealed as part of a general reenactment of the WCL in 1922, but the repeal had not been understood by the Fund or others[1] until the decision below so held, to make the State liable for the Fund if it became insolvent. Appellants, therefore, did not contract in reliance on the State's credit.

[1] C.A. Williams, Insurance Arrangements Under Workmen's Compensation, United States Department of Labor, Wage and Labor Standards Administration Bulletin 317 (1969) at 195:

> no competitive State Fund claims that the State legislature is obligated to support the Fund if it runs into financial difficulties . . . .

special statutory protection to those who insure with the Fund. WCL § 53. Section 53 announces that employees of Fund-insured employers can look only to the Fund for their statutory compensation rights. No matter what happens, they take nothing from their employer. Their common law claims against it are extinguished, as is its obligation under the WCL.

To compete for business with private insurance carriers offering employers multiple lines of insurance coverage, however, and not just New York workers' compensation protection, the law has been amended to permit the Fund to write coverage of all employer liability based on personal injury claims by employees, including liability imposed derivatively in third-party suits for contribution and indemnity. Similarly, the New York employers with employees working in the Port can secure Fund coverage under the Federal Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. § 903. As to these new kinds of insurance, Section 53 does not and cannot release an insured's liability. The insured's liability is not to a person "entitled to compensation under this chapter." The judgment runs against the insured employer; and it must pay if the insurer cannot.

D. *State Insurance Fund Legislation*

This detailed background shows that while workers' compensation law has changed frequently in the scope of its coverages and the details of its administration, the central principles of the Fund's operation as an insurance vehicle have not changed. They are largely determined by the two missions it is designed to fulfill: to be an insurer of last resort and a competitive check. To be sure, the Fund has grown and is now the State's largest writer of workers' compensation insurance, but it competes actively with more than fifty other companies.

Operationally, the Fund works like a mutual insurance carrier, with special features that protect policy-holders from the risks it runs as the insurer of last resort. Premiums are pooled, (WCL § 76(1)), the interest (WCL § 85) or investment income is added (WCL § 87), and the entirety is available for payment

of claims and expenses (WCL § 76(1)). The administrators are directed to create reserves and a catastrophe surplus (WCL § 86), and dividends may be paid back to those whose loss records warrant it (WCL § 90). The language is mandatory: a series of shalls with the single exception of the provision regarding dividends, which says "may" to make clear that policyholders have no legal right to overturn the Commissioner's judgment.*

This legislation formed the background against which the policies of insurance issued by the Fund to Appellants were read and subscribed to. There is, in short, not a word to suggest that the State Insurance Fund can or may be run as anything other than an insurance company. The Fund has from the start actively solicited clients, citing the integrity of the Fund, and its status as "an essentially private insurance carrier" managed by the state and subject, as is a private carrier, to the regulatory controls of the Superintendent of Insurance. WCL § 99.

Institutions live beyond and apart from the technical statutory language that provides their base. Great significance should attach to the fact that the persons who give practical construction and vitality to the Fund, and are aware of the understandings and representations made by them and others on the State's behalf, joined Appellants in urging the challenged legislation's unconstitutionality. Beyond peradventure, no employer who put his or her money into the Fund had any reason to suspect that the State reserved the right to spend that money on the subways, the schools, or whatever else might be desirable as if it were part of general state revenues. The Fund was presented and subscribed to as an insurance business, not a state reserve account.

E. *The Insurance Policy*

The practical effects of the removal of $190 million from the Fund's balances, and the practical consequences that would ensue upon any insolvency of the Fund, must be appraised in light of the insurance contract.

---

* The Court below described the Commissioners without noting that they must be policyholders in the Fund. WCL § 77.

The standard State Insurance Fund policy is set forth in Appendix D. Paragraph one of the policy sets out two separate insurance coverages. Coverage A is coverage for basic workers' compensation liability. This liability is created under New York statutes. New York can extinguish it by § 53.

Coverage B is an entirely different and vastly more complex promise. Its ramifications go far beyond New York law. It deals primarily with the so-called "liability over" problem. This Court is no doubt familiar with myriad complexities of such laws because of its recent decision in *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983). New York law is a leader in expanding liability on claims over. Under *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143, 331 N.Y.S 2d 382 (1972), New York imposes liability "over" against the employer, *i.e.*, the Fund's insured, in accordance with the insured's percentage of fault if one of its employees injured on the job while using some third-party product, sues that third party and recovers in common law litigation, and the third party either impleads the employer or brings a separate action. The fact the employee's direct action against his or her employer is extinguished by the Workers' Compensation Law provides the employer with no immunity for damages the third party has to pay.* The sums at stake in such litigation, tried before juries, are completely unconstrained by workers' compensation schedules. Moreover, defending against "liability over" claims is onerous.

To give an example, the widespread use of asbestos in a number of employments, and in the buildings where employers conduct their business, means that employees who contract asbestosis or other occupational disease may potentially win millions of dollars in judgments against asbestos manufacturers. The Court may take judicial notice of the fact that the asbestos industry itself is filing for anticipatory bankruptcy because of these claims. Under present New York law, Fund insureds, if sued, must contribute to these judgments to the extent that *their* negligence in not cleaning up the factory, or removing asbestos

---

* *See*, Larson, Third-Party Action Over Against Workers' Compensation Employer, 1982 DUKE L.J. 483.

from the building, contributed to the injury. Their immunity to actions directly by their employees is no defense.

Independently of *Dole v. Dow Chemical*, the New York courts have no control over the courts of other states, who have constitutional competence to apply *their* laws of contribution and indemnity, if New York employers can be brought before them. Similarly, if the Federal government creates new causes of action with restrospective impact triggered by past negligence, or new rights are judicially implied from regulatory statutes, the employer must pay unless his insurance carrier does. The important point is that Section 53 of the WCL does not, even as to New York cases, and cannot constitutionally, as to Federal or out-of-state litigation, *release* employers from this liability. At most it operates as a promise that the judgment will be paid, whether by the Fund or the State.

The potential liability of the Fund on outstanding policies is enormous and extremely difficult to calculate. This is one reason why people insure and insurers keep surplus. This Court has taken notice of the complexities of insurance calculation, and the possibility that events can derail estimates. *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978). New York is apparently one of only two states that writes such employer policies without limitation of amount of damages. Appellants' policies issued by the Fund before enactment of Chapter 55 are the ones they must look to for payment on claims founded on exposure in 1975 or 1980.* The Court below appears not to have realized this.

Finally, beyond the two basic insurance coverages, the third crucial promise the policy contains is that the Fund will *defend* any and all suits. There is no way the employer can force the State to defend if the Fund cannot.

---

* *Cf. Keene Corp. v. Ins. Co. of North America*, 667 F.2d 1030 (D.C. Cir. 1981) (holding insurers whose policies were in effect at the time of the employee's exposure to asbestos liable on the risk.)

THE QUESTIONS ARE SUBSTANTIAL

I

THE IMPAIRMENT OF THE OBLIGATION OF APPELLANTS' INSURANCE CONTRACTS PRESENTS A SUBSTANTIAL FEDERAL QUESTION

The State has run a competitive insurance business since 1914. Appellants did not have to purchase insurance through the Fund. They could have purchased it from a private stock or mutual insurance company. They purchased from the Fund because the bargain proposed seemed like a good one. They are entitled to the benefit of their bargain.

The courts below dismissed but did not analyze the impairment of the obligation of Appellants' insurance policies. Instead, the state courts focused on whether the legislation creating the Fund contained promissory language sufficient of its own force to create contract or property rights in the Fund. They held that no such contract or property rights had been created under state law.* The impairment of the obligation of Appellants' insurance policy itself cannot be ignored, however.

This Court's jurisprudence requires, when Contract Clause problems are analyzed, that two issues be kept analytically distinct. One is whether there was a contract created by legislation. The other is, what is the "obligation" of a contract, whether that contract was created by legislation or otherwise. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 at n.14 (1977).

This Court's cases make clear that the insurance contract entered into by the Fund has an "obligation," within the meaning of the Constitution, beyond the specific language of the insurance policy contract. The obligation includes also the background state law against which the contract was made. This principle is one of the oldest points of Contract Clause jurisprudence. *See, e.g., Green v. Biddle*, 8 Wheat 1 (U.S. 1923), and *Von Hoffman v. City of Quincy*, 4 Wall. 535 (U.S.

---

* The consistency of that ruling with Federal standards will be examined in II, below.

1867). Justice Cardozo's opinion in *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1935), is its most important expression inasmuch as the principles of fair accommodation there announced guided this Court in *United States Trust Co., supra* and *Allied Steel v. Spannaus*, 438 U.S. 234 (1978). In *United States Trust Co.*, 431 U.S. at 19 n.17, this Court specifically reaffirmed the doctrine, noting, "the obligations of a contract long have been regarded as including not only the express terms but also the contemporaneous state law pertaining to interpretation and enforcement." This background law doctrine, the Court specifically stated, is distinct from the principle that legislation, standing alone, can constitute a contract with those who rely on it. 431 U.S. at 17 n.14.

Thus, the error of the courts below was their insistence that legislative language "rise to the level of language 'susceptible to no other reasonable construction' than that a contract was intended." 486 N.Y.S.2d 905, 911 (1985) (citing New York precedent on the contractual character of legislative acts.) But there is no constitutional requirement, nor can a state constitutionally impose a requirement, that legislative language be inescapably "promissory" to become an aspect of the "obligation of contract" protected by Article I, Section 10. For example, the legislation, in *Spannaus, supra*, was not declared unconstitutional because it required any breach of promise. It was held invalid because it dramatically changed the background laws governing the meaning and consequences of "promises" and applied those changes prospectively.

The principle that the obligation of contract includes the statutes under which an agreement is written extends to government insurance contracts. In *Lynch v. United States*, 292 U.S. 571 (1934), Justice Brandeis wrote about Federal war risk insurance policies:

> The terms of these contracts are to be found in part in the policy, in part in the statutes under which they are issued and the regulations promulgated thereunder.

This rule is clearly appropriate in this case. Indeed, Paragraph 12 of the policy itself invites reference to the Workers' Compensation Law. Without the Workers' Compensation Law, it would be impossible for the employer to know with whom he was contracting, because the State Insurance Fund has no identity save for the legislation that establishes it.

When one does refer to the Workers' Compensation Law, a series of provisions create the Fund and describe how it shall operate. The most important features are those that make the Fund secure by prescribing the basis on which premiums shall be held and invested, and what they may be spent on. These security provisions must become part of the obligation of contract.

First, employers looking for ways to protect themselves from losses that can bankrupt them are vitally concerned with whether they can count on the promises made. This is especially true on insurance policies whose coverage and obligations of defense extend to the indefinite future, as do the Fund's. Second, the New York courts have explicitly held that the obligation of an insurance company policy is impaired when the insurer's reserves are diverted:

> . . . the contract of an insurance company with its policyholders *implies* that it will retain its assets in its own possession and continue its business; that if it reinsures its risks and parts with its reserves its contract is at once broken. . . .

Mason v. Cronk, 125 N.Y. 496, 503 (1891) (emphasis added). Third, *United States Trust Co.* has settled this point. No one suggested that the Covenant's repeal immediately jeopardized the Port Authority's bonds. Indeed, no State legislation had been passed permitting the Port Authority to spend new monies on deficit rail transit. A cause of action arose simply because New York and New Jersey had, in effect, announced their readiness to take such action by repeal of the express promise. Here, by contrast, the State has swallowed the security and "replaced" it with a chimera. It is completely contrary to the path of legal

development, from the growth of declaratory judgment principles to the development of doctrines of anticipatory repudiation in contract law, to require a person whose security is taken to await default on the promise, to whose discharge the security is pledged.

The impairment of the Fund's security cannot be ignored on any of the grounds the courts below advanced: that "only" the Fund's "surplus" was taken, that the State will be liable if the Fund becomes insolvent, and that the insurance policy itself is subject to amendments of the Workers' Compensation Law. Each of these grounds is discussed in turn.

A. *Surplus*

The Court below intimated that the $190 million transferred by Chapter 55 are somehow unrelated to the insurance needs of the Fund, and, that if the State had not taken them they would have immediately been paid as dividends, making the issue whether the Appellants or the State gets the money. Yet there is no basis whatever for this judgment. The Fund has no legal authority to hold money unless the Commissioners determined that it is necessary as reasonable reserve and surplus. WCL § 89. Chapter 55 cannot be treated as a legislative determination that the Fund's commissioners had breached their duties in deciding what surplus is reasonable. Surplus is a cushion for the absorption of catastrophic future losses; arguably all the Fund's surplus is collected as catastrophe hazard. WCL § 86.

B. *The State's Liability*

Since the Court of Appeals has held that the State is obliged under New York law to pay claims against the Fund, if it becomes insolvent, it may be claimed there can be no security risk to Appellants. Again, this is without support.

The Court below did not explicitly hold that the State is *contractually* bound to pay claims against the Fund. The two laws which the Court principally invoked, WCL § 53 and WCL § 76, make no express promise. Neither mentions the State. Section 53 says "shall" yet we know from the courts' opinions below

that New York does not infer promises from language which is not expressly promissory. As to Section 76(1), the Court infers State liability from the repeal of an earlier limitation. To call the State's liability under current law a promise, but deny the promise in the legislation limiting uses of the Fund, emphasizes that the State appears to be construing its state law categories to avoid judicial review, here and in our companion case, *American Insurance Assoc. v. Chu*, 64 N.Y.2d 379 (1985).

Moreover, if the opinion below is read to "promise" the State's credit in the event of the Fund's insolvency, the contract is still gravely impaired. There is no way Appellants can require the State to defend them in court, particularly on third-party claims. Appellants must defend themselves, and then pursue the State in the Court of Claims. This is most certainly not what they bargained for. New York defines the obligation to defend as central to an insurance contract. *Decker v. Amalgamated Mutual Casualty Inc.*, 35 N.Y.2d 950, 365 N.Y.S.2d 172 (1974).

Finally, the State too may become insolvent. This prospect is hardly fanciful when one recalls that the State almost did become insolvent in the mid-1970s, and indeed, was threatened precisely because it and its subdivisions had formed the habit of spending money without regard to where it was coming from. In the event of the State's insolvency, insureds must pay their claims for liability over. Moreover, this Court has never countenanced on due process grounds the extinction of all common law claims without provision of some remedy.* The notion that, in crisis, employers would go free of liability under § 53 while injured workers joined the ranks of the State's creditors is both constitutionally doubtful and political nonsense.

The insurance contract in this case pledged the availability of a segregated fund and the duty to defend insured employers in court. Appellants are entitled to rely on those pledges. That the "fund" involved consists entirely of money they contributed in the classic manner of a mutual insurance program only emphasizes the point.

---

* *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88 (1978), contains a discussion of the point.

C. *Policy Subject to Statutory Changes*

The third argument is that the policy itself announces that it is subject to amendment by changes in the Workers' Compensation Law. This provision is designed to provide flexibility for alteration in coverages and administration, not to reserve the State's right to obliterate the basic structure and function of an insurance fund. It should be noted that, however frequent the changes in workers' compensation coverage, and its many details, the basic insurance structure had not changed at all since 1914. *Cf. Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983).

In *Lynch v. United States*, *supra*, as here, the insurance policy was subject to "all amendments to the original Act, to all regulations then in force or thereafter adopted." 292 U.S. at 577. The Court insisted, however, that such changes could be tolerated only "within certain limits of application" not extending to extinction of vested rights. That *Lynch* formulation is echoed by this Court's language in *United States Trust Co.*, 431 U.S. at 19, n.17, that the line of permissible change "may be viewed as approximating the result of a more particularized inquiry into the legitimate expectations of the contracting parties." The legitimate expectation of Appellants is that they were purchasing insurance, insurance that came with the further prospect of price reductions if their efforts to promote a safe work place succeeded. Their possible receipt of such benefits did not need to pass the test of whether the subways require more money.

II

CHAPTER 55 IMPAIRS THE STATE'S CONTRACTUAL OBLIGATION TO MAINTAIN THE STATE INSURANCE FUND AS A TRUST

Section 76(1) of the Workers' Compensation Law creates the State Insurance Fund,

> for the purpose of insuring employers against liability . . . and of assuring to the persons entitled thereto the compensation and benefits provided by this chapter . . . . Such fund shall consist of all premiums . . . properties and securities acquired through the use of moneys belonging to the Fund and of interest earned . . . . Such fund shall be applicable to the payment of losses sustained on account of insurance . . . payment of expenses . . . and payment of premium for reinsurance.

The Court of Appeals, and the lower New York courts, held this language insufficient to impress the funds collected with a trust, for the benefit of both employers and their employees. Neither the words of this statutory section, nor those of the other sections earlier described have the requisite indicia of a contractual promise under State law, the Court held.

The lower court's holding concerns a point of State law, yet this Court has, from the beginning, insisted on its duty to review whether a "contract" has been made within the meaning of the United States Constitution. The leading case concerning the precise issue here presented — whether a statute is a contract though the State says it is not — is *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938).

To determine the federal question concerning the contractual character of state law requires evaluation of whether the the state court's approach fits its legal landscape.

A. *New York Precedents*

The Court of Appeals' denial that the State has promised a trust ignores the views of those who have administered the program

and given it practical life, who claimed, in this very litigation, that this was the basis on which they had proceeded.

It ignores that the State Fund is classified as a "fiduciary fund" by § 70 of the State Finance Law (Laws 1981 Ch. 405), a statute requiring the classification of funds not otherwise classified by law. The person charged by law with characterizing the status of funds for reporting purposes is the State's Comptroller. The funds do not obtain "fiduciary" status simply by virtue of the classification. Nonetheless, the Comptroller's action demonstrates his view of the Fund's status, acted upon before the instant litigation in which he is a defendant.

Similarly, a fair implication of the legislature's resort to the "dry appropriations," which are "deemed an admitted asset of the state insurance fund" is that the legislature that thus embarasses itself, and attempts to turn paper promises into money in violation of the central meaning of the Contracts Clause, thought it was dealing with a fund that it could not simply take. By contrast, the court below thought the "dry appropriations" a "pledge or earnest" of the State's intention to carry out its obligation to pay all the Fund's debts.

Finally, the New York Court of Appeals itself, had decided in 1977, although only by necessary implication, that the Fund was held in trust. In *Wein v. Levitt*, 42 N.Y.2d 300 (1977), the Court faced a claim that an indemnification provision, protecting those fund custodians obliged by legislative direction to invest in novel securities issued to help the State and its municipalities survive its fiscal crisis,* violated the state constitutional provisions. Inasmuch as the statute mandating the

---

* The Appellate Division below found this legislative direction to invest a precedent for Chapter 55's routine invasion of a trust for spending purposes, indeed reasoning that the fact that no policyholder sued to stop it was persuasive authority. Yet, unlike *United States Trust Co. v. New Jersey*, *supra*, no trustee exists to protect policyholder rights at every turn. Moreover, no one can question the genuineness of fiscal emergency that existed in the mid-1970's. As this Court held in *United States Trust*, *supra*, even state financial obligations can be overcome by genuine emergency.

[Footnote continued on next page.]

investment provides the Fund's custodian also with immunity, the indemnification might have been upheld as entirely superfluous, and therefore giving rise to no possible constitutional issue. The Court of Appeals, however, treated the legality of the indemnity clause on the merits, recognizing the possibility of a suit for breach of fiduciary duty. Moreover, dissenting on the indemnity point, Chief Judge Breitel was explicit: "The State Insurance Fund is, in effect, a trust fund for the benefit of claimants and insureds."

B. *State Funds in Other Jurisdictions*

Seventeen states other than New York have created a type of State insurance fund as part of their statutory workers' compensation programs. Each of these states has had occasion to consider the nature of the monies in its state insurance fund and the permissible use of these monies. None of these states has permitted these monies to be diverted from the funds and used for a general state purpose, unrelated to the workers' compensation scheme.*

All these states have recognized that the monies paid into the state insurance fund are not paid to the state generally, but rather paid as part of a program for compensation to injured workers, and that these monies are held in trust for the particular purpose set forth in the statutes which create the funds. This is also the way the funds are described in the leading insurance texts. 7B Appleman, *Insurance Law and Practice*, § 4592 (1979). These authorities are simply illustrative of the broader principle that the

---

[Footnote continued from previous page.]

The Appellate Division's observation illustrates, however, the importance of this case. For once such violent disruptions of the legal order are countenanced, the legitimation of the principle leads rapidly to further violations.

* Citations to the decisions of states other than New York considering the nature of state insurance fund monies appear in Appendix C.

diversion of funds created and collected for one express purpose to general state purposes cannot be condoned.**

New York's denial that the State has agreed to hold the Fund in trust stands out in contrast to the prior law of other states, and yet may serve as a model for the states that have never decided whether their states are obliged to support the Fund. We have shown above that the Court's position cannot be justified by a theory that the State is liable for claims against the Fund.

C. *This Court's Heightened Review*

In *United States Trust*, this Court made clear that the Contracts Clause speaks with special force to contracts made by the States themselves. 431 U.S. at 26. Subsequent cases have echoed this view. *National Railroad Passenger Corp. v. Atchison Topeka & Santa Fe Railway Co.*, ____ U.S. ____, 53 U.S.L.W. 4285 (1985); *Energy Reserves*, *supra*; *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

That "special force" obliged this Court to an active supervisory role in *United States Trust Co.* The issue there was whether heightened scrutiny should be given to a State's claim that public emergencies mandated use of the police power. To let the State be the judge, renders the Contract Clause a nullity so far as its judicial enforcement. In *United States Trust*, however, there was at least a genuine police power interest in problems whose dimensions had magnified many times over since the State's covenant had been made. Chapter 55, by contrast, can claim no such police power interest. Indeed, none has been claimed in the courts below. It is simply a budget bill, designed to avoid the unpleasant necessity of reducing spending,

---

** *See* Opinion of the Attorney General of Maryland, February 9, 1981, 66 Op. Atty. Gen. Md. 56 (transfer to general funds of Fair Campaign Financing Fund monies would violate the Contract Clause); *California Teachers Assoc. v. Cory*, 155 Cal.App.3d 494 (1984) (state's refusal to make an appropriation to a pension fund violated Contract Clause); *Valdes v. Cory*, 139 Cal.App.3d 773 (1983) (transfer from reserves of pension fund to balance budget violates Contract Clause).

raising taxes, or borrowing money at interest to pay current governmental operations.

To admit the existence of a contract in this case is to invalidate the law. In such circumstance, the "heightened scrutiny" principle of *United States Trust Co.* must be applicable to the constructions of State law put forward to shield the law from federal review. Especially is this so when in parallel litigation, the state courts, faced with violation of statutory pledges that could not be more explicit, find their adjudicatory system incapable of resolving anticipatory claims. *See American Insurance Assoc. v. Chu*, 64 N.Y.2d 379 (1985).

D. *Conclusion*

In *United States Trust Co.*, this Court reaffirmed an important principle about government and its obligation to keep its promises. The controlling issue there was not the extent to which a specific covenant affected the ultimate security of Port Authority bonds; the shock was that a bond was breached. Similarly, in this case there can be no shadow of a doubt that the State, through its administrative and legislative branches, has invited people to pay their money on promises of trust that it has now repudiated.

This Court's intervention in *United States Trust Co.* worked to reassure those concerned with the integrity of the nation's capital markets; in this case, Appellants are employers throughout the State, but the trust they seek to have secured inures also to the benefit of injured men and women, the victims of workplace accidents. It was for their claims, whose dimensions are incalculable, that the monies taken were held. They too are entitled to punctilious observation of government's responsibilities.

III

CHAPTER 55 TAKES APPELLANTS' PROPERTY WITHOUT DUE PROCESS OF LAW

The State has contracted to maintain the State Insurance Fund in trust for the purposes set forth in Section 76(1) of the Workers' Compensation Law, or ones that may be assimilated to it. That contract specifically recognizes the beneficial property interests of policyholders in the Fund. There can be no other plausible reading of Section 90 of the WCL, directing that separate accounts be maintained for different groups, and authorizing the payment of dividends to each member of the group, on the basis of its pro rata contributions. The entitlement to dividends even extends to persons who have withdrawn from the Fund.

If this contract argument is accepted, then the property claims are probably superfluous, inasmuch as the Contract Claim provides comparable relief. However, the Court has upheld some contract "impairments" on the grounds that they were, in the circumstances of particular cases, insufficiently egregious to warrant constitutional interdiction. The Court has not had the same tolerance for low-threshold takings of personal or real property. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 15 (1980).*

If this Court declines to recognize the existence of a contract that has been impaired by the legislation in question, then there is room for a due process property claim. The New York law of trusts is clear that a person can obtain enforceable rights as a beneficiary of a trust even if he has made no contract to induce its settlement. Further, those rights extend to suing to enforce the provisions of the trust, and prevent the depletion of the trust's assets. *Velez v. Feinstein*, 87 A.D.2d 309, 451

---

* Inasmuch as the Court of Appeals made no assertion that any contract impairment here was insubstantial, this possible distinction between contract and property is not crucial. And for reasons we have earlier argued, no such claim of insubstantiality is plausible.

N.Y.S.2d 110 (1st Dept. 1982). The implications in this context are that Appellants can vindicate their "property" rights – even if the Court were to regard the "trust" the state established as one having no connection with promises made to persons who insure through it.

CONCLUSION

For the reasons stated above, probable jurisdiction should be noted.

Respectfully submitted,

HAROLD EDGAR
1158 Fifth Avenue
New York, New York 10029
(212) 427-5977

ROBERT B. DAVIDSON*
ABIGAIL T. REARDON

BAKER & MCKENZIE
805 Third Avenue
New York, New York 10022
(212) 751-5700

* *Counsel of Record*

APPENDIX

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

New York County Clerk's Index No. 8357/82

Court of Appeals
State of New York

METHODIST HOSPITAL OF BROOKLYN, ACCIDENT PREVENTION & SAFETY LEAGUE, INC., and NAGEL, INC.,

Appellants,

—against—

THE STATE INSURANCE FUND, MARTIN A. FISCHER, EASTMAN BIRKETT, LOUISE COSTE, CHARLES G. MOERDLER, ALBERT C. TODARO, RIVKA CHATMAN, BART DI MATTINA, JAMES H. SCHOLTZ, and LILLIAN ROBERTS, as Commissioners of the State Insurance Fund; ARNOLD KIDECKEL, as Executive Director of the State Insurance Fund; JUSTIN SCHULMAN, as Supervising Actuary of the State Insurance Fund,

Appellants,

EDWARD V. REGAN, as Comptroller of the State of New York; the Commissioner of Taxation and Finance of the State of New York; and the STATE OF NEW YORK,

Respondents.

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. § 1257(2), Appellants Methodist Hospital of Brooklyn, Accident Prevention and Safety League, Inc. and Nagel, Inc., hereby appeal to the Supreme Court of the United States from the final judgment

entered herein in the offices of the Clerk of the Court of Appeals on February 21, 1985, wherein it is adjudged that Chapters 55 and 404 of the laws of 1982 are constitutional, and that they appeal from each and every part, and the whole, of said judgment.

Dated: New York, New York
May 17, 1985

BAKER & McKENZIE
Attorneys for Appellants
805 Third Avenue
New York, New York 10022
(212) 751-5700

TO: FISCHER & FISHER
Attorneys for Appellants
189 Montague Street
Brooklyn, New York 11201
(718) 624-0608

ROBERT ADAMS, ESQ.
Attorneys for Respondents
2 World Trade Center
New York, New York 10047

HONORABLE LILLIAN ROBERTS
Defendant-in-Person
2 World Trade Center
New York, New York 10047

APPENDIX A

DECISIONS OF THE COURTS BELOW

1. Decision of Supreme Court, New York County, Special Term Part I (McCooe, J.), dated February 3, 1983.

2. Decision of the Appellate Division, First Department, dated June 26, 1984.

3. Decision of the Court of Appeals, dated February 21, 1985.

Index No. 8353/82

Supreme Court New York County
Special Term: Part 1

METHODIST HOSPITAL OF BROOKLYN, ACCIDENT PREVENTION & SAFETY LEAGUE, INC., and NAGEL, INC.,

Plaintiffs,

– against –

THE STATE INSURANCE FUND, MARTIN A. FISCHER, EASTMAN BIRKETT, LOUISE COSTE, CHARLES G. MOERDLER, ALBERT C. TODARO, RIVKA CHATMAN, BART DI MATTINA, JAMES H. SCHOLTZ, and LILLIAN ROBERTS, as Commissioners of the State Insurance Fund; ARNOLD KIDECKEL, as Executive Director of the State Insurance Fund; JUSTIN SCHULMAN, as Supervising Actuary of the State Insurance Fund, EDWARD V. REGAN, as Comptroller of the State of New York; the Commissioner of Taxation and Finance of the State of New York; and THE STATE OF NEW YORK,

Defendants.

McCOOE, J.:

Plaintiffs move and the defendants cross-move for summary judgment (CPLR 3212) in an action where plaintiffs seek (1) to enjoin the transfer of monies from the State Insurance Fund (SIF) to the New York State (State) General Fund pursuant to recently enacted Chapters 55 and 404 of the Laws of 1982 and (2) for a declaration that such statutes are unconstitutional with respect to such transfers.

Plaintiffs are policyholders of the defendant SIF and their standing rests on such status.

Defendants are the SIF and State officials charged by law with duties relative to the administration of SIF. SIF was created by statute to provide Workers' Compensation Insurance on a competitive basis with private insurers and accepts policyholders who are rejected by private insurers.

THE CHALLENGED LEGISLATION

Chapter 55, the omnibus budget measure for State revenues during the 1982-1983 fiscal year, amended the Workers' Compensation Law (WCL) by Sec. 92(2) of the chapter mandating the transfer of $190 million from SIF to the general fund of the State of New York (State). The statute also provided for future transfers. Chapter 55 further provided in WCL 87(f) as implemented by an appropriations statute, Chapter 404 of the Laws of 1982, in substance, a "dry appropriation" whereby $190 million was appropriated and made available to the SIF only if its reserves were unable to meet claims of its policyholders. The appropriation was to be "deemed an admitted asset of the State Insurance Fund."

The transfers were to be effected on or before March 1, 1983 and expenditure of the appropriation, if any, is to be made no later than July 1 of the next fiscal year.

PLAINTIFFS' CONTENTIONS

Constitutional violations, Federal and State, are the basis for the claimed unconstitutionality of the legislation. The arguments may be summarized as follows:

1. The legislation which provides for the transfer of SIF assets constitutes an impairment of plaintiffs' contractual obligations with SIF. Article I, Section 10 of the U.S. Constitution prohibits the states from enacting any law impairing the obligations of contracts.

2. The legislation takes private property of plaintiffs in their SIF policies and SIF assets without due process of law. This due process argument proceeds under the Fourteenth Amendment, U.S. Constitution and N.Y. Const. Art. I, Sec. 6.

3. The legislation which provides for the transfer of funds constitutes an unlawful intrusion upon the discretion of State officials. N.Y. Const., Art. V, Sec. 3 imposes limitations on the power of the legislative branch over the executive branch.

4. The legislation, guaranteeing the solvency of SIF, constitutes a loan or gift of the State's credit, which N.Y. Const., Art. VII, Sec. 8(1) prohibits, except for certain educational or health purposes.

5. The legislation, which compels the rollover of an appropriation on a continuous basis, creates a debt of the State. N.Y. Const., Art. VII, Sec. 9 and 11 prohibits such a practice.

6. The legislation, which contains an implicit requirement that appropriated funds are to be expended, constitutes an unlawful appropriation scheme in violation of N.Y. Const., Art. VII, Sec. 7 and N.Y. State Fin. Law, Sec. 40(2)(a) and (3).

7. The legislation, insofar as interest is lost on the transferred funds, constitutes a loss to plaintiffs and higher premiums constituting a de facto tax. This practice violates N.Y. Const., Art. III, Sec. 22 which specifies the procedures for the imposition of a tax.

Defendant SIF concurs with plaintiffs' arguments and submits two additional arguments supporting the unconstitutionality claims of plaintiffs.

1. The transferred funds constitute "fiduciary funds" as defined in State Finance Law, Sec. 70 (1)(g).

2. Vested property rights are present in the WCL and SIF insurance.

DEFENDANTS' CONTENTIONS (EXCEPT SIF)

The arguments may be summarized as follows:

1. A strong presumption of constitutionality attaches to the legislation.

2. There is no impairment of contract rights as constitutionally interpreted.

3. Plaintiffs have not established property rights or a taking as constitutionally interpreted.

4. The legislation comes within the legislative province and does not constitute either a debt of the State or a loan or gift of the State's credit.

5. The legislation does not constitute an unlawful appropriation scheme or de facto tax.

DECISION

Summary

Defendants' cross-motion is granted and plaintiffs' motion is denied. The plaintiffs have failed to overcome the strong presumption of constitutionality requisite to a finding of unconstitutionality of the legislation. They have failed to establish property rights or a "substantial impairment" of contract rights. The rationale underlying this ruling is the finding that based upon precedent and statutory interpretation, the State Insurance Fund is a State agency whose assets are not subject to the private property rights of plaintiffs. The money transfers are purely internal and not subject to the infirmities claimed. Impairment, even if present, of the policyholders' contracts is incidental and prospective. Plaintiffs presuppose increases in premiums and guarantees of claimed rights as policyholders which are not supported by the Workers' Compensation Law or any law, either

statutory or decisional in this jurisdiction. There is no compulsion for plaintiffs to purchase insurance from SIF in the future and the effect, if any, of the transfer is prospective. A more detailed explanation of the holding follows this synthesis.

DETAILED DECISION

This Court, in its role as a separate but equal partner in our democratic process, has a defined role in reviewing the actions of the legislative branch of government. This role is limited by the "simple, but well founded, presumption that an act of the Legislature is constitutional and this presumption can be upset only by proof persuasive beyond a reasonable doubt." Dorset v. Cultural Resources, 46 N.Y.2d 358, 370. See also Cook v. City of Binghamton, 48 N.Y.2d 323 (1978). Recognition of this standard necessarily precludes an examination by this Court of the judgment exercised by the Legislature which should be debated in the legislative and public arenas where input by responsible groups strive to carry out public policy goals. Appreciating this role we now turn to the judicial role, namely an examination of the legislation as to its constitutionality.

The first argument raised by plaintiffs, that the legislation impairs their contractual obligations, is legally deficient as a matter of law. The "first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." Allied Structural Steel v. Spannaus, 438 U.S. 234 (1978). Plaintiffs' contention that they possess contractual rights such as to insurance premium rates and the disposition of reserves from the WCL and policies and the WCL are devoid of any rights or guarantees impaired by this legislation.

Plaintiffs, to succeed on this motion, must first point to rights or guarantees in the policies or WCL. The sections of the WCL relied upon by plaintiffs to establish these guarantees are not promises but simply expressions of legislative policy. This critical distinction has been expressed by the Court of Appeals. Cook v. City of Binghamton, supra; Penn R.R. Co. v. State of New York, 11 N.Y.2d 504. The Court in Cook at pg. 329 distinguished

that case from Patterson v. Carey, 41 N.Y.2d 714 where a specific prior pledge to bondholders permitting an authority to raise tolls was violated by the Legislature rescinding the toll increase. The Supreme Court has adopted the same rule of statutory construction. "It is settled that, before a law may be deemed to amount to a contract between the State and a third party, the statutory language must be examined and found to be 'plain and susceptible of no other reasonable construction' than that a contract was intended. Stanislaus County v. San Joaquin C. & I. Co., 192 U.S. 201, 208 cited with approval in Penn R.R. Co. v. State of New York, supra at 511.

There is no promise in either the WCL or the insurance policies which has been shown to have been violated.

Assuming arguendo that plaintiffs establish the requisite promises, they would then have to prove a "substantial impairment" of the contract. Allied Structural Steel v. Spannaus, supra. Incidental effect on a contract is not equivalent to an impairment of contract in the constitutional sense. Quirk v. Municipal Assistance Corp. for N.Y.C., 41 N.Y.2d 644; Withers v. Teachers Retirement System, 447 F. Supp 1248, Aff'd 595 F.2d 1210; Tron v. Condello, 427 F. Supp. 1175; Northwestern National Life Ins., Co., v. Tahoe Regional Planning Agency, 632 F.2d 104. Plaintiffs have not proven a "substantial impairment" or even an "incidental" effect upon their alleged contract rights. The claim that premium rates will increase is based on "hypothetical assumptions" based upon numerous variables. Similarly a decrease in dividends has not been established. SIF's loss of interest on the transferred funds is not automatically translated into higher dividends and lower premiums. The affidavit of the Superintendent of Insurance affirms this fact. Lastly it is important to recognize that these claimed adverse consequences will not take place during the current policy period. Prospective losses under future policies are not within the protection of the impairment clause. Therefore plaintiffs have not proven the requisite "substantial impairment." Plaintiffs reliance on decisions from other jurisdictions have no precedential value since they are based on dissimilar statutory language.

The second argument raised by plaintiffs is that the legislation effected a taking of property without due process of law. Plaintiffs claim a property interest in SIF assets and contractual rights to certain insurance rates and dividends. Plaintiffs must prove a right or interest in this property. The requisite showing is stated in Roth v. Board of Regents, 408 U.S. 564 (1972) where the Court said:

> Certain attributes of "property" interests protected by procedural due process emerge from these decisions. *To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of i. He must instead, have a legitimate claim of entitlement to it.* It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law rules or understandings that secure certain benefits and that support claims of entitlement to those benefits....(408 US at 577, emphasis supplied)

Plaintiffs claim a property right in the assets of SIF contending that it is not a State agency and its assets are "fiduciary funds." SIF is a State agency whose monies are State monies for which the State is liable and which give rise to no constitutionally protected property interest of plaintiffs. Among the characteristics of SIF leading to this conclusion are:

(a) The selection of directors by the Governor with the advice and consent of the Senate (WCL Sec. 77).

(b) Legislative selection of state officials as treasurer and investment adviser (WCL, Secs. 85 and 87);

(c) Employee selection under Civil Service Rules (WCL, Sec. 82);

(d) Deposit of excess monies as State funds (WCL, Sec. 85);

(e) Legislative approved budget and expenditure pre-audit by State Comptroller (WCL, Sec. 88; L. 1981, Ch. 1056; L. 1982, Ch. 50); and

(f) Legislatively mandated investments (WCL 87-1-c).

Decisional law has established that SIF fund monies are State monies. Matter of State Ins. Fund v. Boyland, 282 A.D. 516, aff'd no op. 309 N.Y. 1009, and Cahill v. Tremaine, 245 A.D. 773, aff'd no op. 269 N.Y. 573.

Reliance on Sec. 70 of the State Finance Law to establish a property right in the assets of SIF is misplaced. This section, entitled Accounting, Financial Reporting and Budget Accountability Reform Act of 1981, L. 1981 C. 405 (Reform Act) created seven categories of *State funds* (emphasis supplied) ranging from "general funds" to "fiduciary funds." This law does not create any substantive rights in plaintiffs and its purpose is to establish guidelines for good accounting procedure. The section gives the State Comptroller the power to "classify each fund, not classified by law" and provides for a reclassification procedure. There is no specification of SIF or any agency nor is there any showing that SIF has been "classified by law" in the WCL which defines its powers. Any classification given may be changed and any classification given, even by an officer of the State, does not establish a rule of law. The fact that a state official has classified it as a trust fund creates no property right in SIF or plaintiffs since the statute specifically provides for reclassification. Assuming arguendo that the funds are "fiduciary funds", the beneficiaries are injured workers and not policyholders or employers. Furthermore the property is not being taken—it is being internally transferred within the State financial structure and a substitute fund is being legislatively created in lieu thereof. This is not a situation where a fund is

being depleted which endangers the credit or financial stability of SIF. It is not a situation where there is a risk that injured claimants may lose benefits. What is present is a transfer of excess funds with an equal amount of money appropriated by the State as a contingency fund.

Plaintiffs alleged "entitlement" cannot rest on contractual rights since it has already been established that the plaintiffs have none, and the same reasoning of an "incidental" effect on the policyholders is applicable. Tron v. Condello, supra; Withers v. Teachers' Retirement System, supra. A mere diminution in value does not equate with a taking in a constitutional sense. Andrus v. Allard, 444 U.S. 51 (1979).

Plaintiffs and SIF have failed to establish a "legitimate claim of entitlement" to the property or a taking which rises to the limit of a constitutional deprivation.

The third argument of plaintiffs alleges legislative intrusion upon the discretionary powers of officers of the executive branch, relying on the general rule enunciated in Saxton v. Carey, 44 N.Y.2d 545, 549 that each branch of government is to be free from interference by either of the other two branches. The powers of the Legislature over the executive branch are prescribed in N.Y. Const. Art. V, Sec. 3.

Plaintiffs contend that the statute mandates a transfer of funds, a practice invalidated in Patterson v. Carey, supra, and Sgaglione v. Levitt, 37 N.Y.2d 507. In Patterson the prohibited divesting of discretion of the Comptroller involved public benefit corporations, the supervision of whose accounts are not subject to legislative interference, rather than funds of a State agency such as SIF which may be regulated. Similarly in Sgaglione v. Levitt, supra, the Art. V, Sec. 7 issue involved employee retirement benefits rather than State agency funds presently under consideration. N.Y. Const. Art. I, Sec. 18 provided a broad scope of legislative power over the field of workers' compensation that has received judicial approval. Wolf Cont. Co., v. Schmidt, 269 A.D. 201, aff'd 295 N.Y. 748. Aside from this express grant the scope of legislative power over the executive

has been broad since the decision in Stanton v. Board of Supervisors, 191 N.Y. 428, 432-433. Plaintiffs have not established the enactment of Section 55 exceeded the power of the Legislature.

Plaintiffs' fourth argument is that the two statutes, Chapters 55 and 404 violate N.Y. Const. Art. VII, Sec. 8(1) which prohibits a loan or gift of the State's credit. This contention is refuted by the language of Sec. 8(1) itself which limits its application to aiding "any individual, or public or private corporation or association, or private undertaking", a definition which does not extend to SIF, which is a state agency rather than a corporate entity. Cayuga County v. State of New York, 153 N.Y. 279.

Plaintiffs' fifth argument urges that Chapter 55 creates a debt from the State to SIF in violation of N.Y. Const. Art. VII, Secs. 9 and 11, which refer to short term and long term debt respectively. Plaintiffs describe the interplay in Chapter 55 of Sec. 92(2) which takes $190 million from SIF and the several parts of Sec. 86 which establish an appropriation mechanism, require payment to SIF and deem any appropriation an admitted asset of SIF. Plaintiffs characterize this as a "debt consisting of a rollover and a continuing device to assure the solvency of SIF. Reliance is placed on Newell v. People ex rel Phelps, 7 N.Y. 9 which involved canal revenue certificates and the creation of an unconstitutional appropriation by the State to pay interest on the same. Plaintiffs view the State as undertaking an obligation to repay in the future the $190 million transferred from SIF and rely upon Wein v. State, 39 N.Y.2d 136. Wein is distinguishable since it was a taxpayer's action holding at page 140 that the prohibition against the giving or lending of the credit of the State to public corporations was not violated by the issuance of notes to fund reimbursable advances to N.Y.C. and MAC-NYC. Aside from the inapplicability of the Wein decision plaintiffs run afoul of the status of SIF as a State agency, hereinbefore discussed, which militates against the theory that a debt was created in favor or a separate entity, as occurred in Newell v. People ex rel Phelps, supra. The enactment of an

appropriation by Chapter 404 was simply a method to enable re-transfer of monies to SIF. Accordingly plaintiffs have failed to establish the creation of a debt.

Plaintiffs' sixth argument is that an appropriation scheme prohibited by N.Y. Const. Art. VII, Sec. 7 has been created insofar as it does not require expenditure of the appropriation within the two year constitutional time limitation. Plaintiffs rely on County of Oneida v. Berle, 49 N.Y.2d 515, which is distinguishable since that Court held that executive impoundment of municipal sewage treatment funds was not necessitated by the Governor's duty to balance the budget, which extended only to proposing one and not to maintaining it throughout the year. The present statutory scheme does not involve impoundment but instead provides for an expenditure within the two year limitation measured from the time of appropriation as set out in Art. VII, Sec. 7.

The final argument of plaintiffs is that the transfer of $190 million from SIF resulted in a loss of investment income and a consequent de facto tax on employer-insureds in violation of N.Y. Const. Art. III, Sec. 22, which requires a tax and its object to be distinctly stated. It is argued that employers are forced indirectly through higher premiums to contribute to the general fund of the state through a general revenue raising measure rather than a fee relating to a special benefit or service rendered. Apart from an absence of showing any increased premiums, the transfer of funds and consequent loss of interest income are not a tax since no forced contribution of plaintiffs is involved and since insurance coverage is available elsewhere. Even assuming arguendo that a tax is created it would be permissible as a special tax on one class of property rather than one falling "generally upon the entire property of the State and known at the time of the adoption of the Constitution." Matter of McPherson, 104 N.Y. 306. Therefore for the reasons stated this argument has no validity.

CONCLUSION

The Court denies plaintiffs' motion for summary judgment and grants defendants' cross-motion for summary judgment declaring that the provisions of L. 1982, Chs. 55 and 404 considered herein are constitutionally valid.

Settle Judgment.

Dated: February 3, 1983

WILLIAM P. McCOOE
J.S.C.

SUPREME COURT, APPELLATE DIVISION
First Department, September 1983
Opinion dated June 26, 1984

John Carro, J.P.
Arnold L. Fein
E. Leo Milonas
Bentley Kassal
Fritz W. Alexander II, JJ.

.....X

METHODIST HOSPITAL OF BROOKLYN, ACCIDENT PREVENTION & SAFETY LEAGUE, INC. and NAGEL, INC.

Plaintiffs-Appellants-Respondents,

—against—

THE STATE INSURANCE FUND, MARTIN A. FISCHER, EASTMAN BIRKETT, LOUISE COSTE, CHARLES G. MOERDLER, ALBERT C. TODARO, RIVKA CHATMAN, BART DiMATTINA, JAMES H. SCHOLTZ and LILLIAN ROBERTS, as Commissioners of the State Insurance Fund; ARNOLD KIDECKEL, as Executive Director of the State Insurance Fund; JUSTIN SCHULMAN, as Supervising Actuary of the State Insurance Fund, 17436

Defendants-Respondents-Cross-Appellants.

EDWARD V. REGAN, as Comptroller of the State of New York; the Commissioner of Taxation and Finance of the State of New York; and the STATE OF NEW YORK.

Defendants-Respondents.

.....X

Appeal by the plaintiffs-appellants-respondents and the defendants-respondents-appellants from a judgment of the

Supreme Court, New York County (William P. McCooe, J.), entered on February 24, 1983 which denied plaintiffs' motion for summary judgment and granted defendants-respondents' motion for summary judgment declaring Chapters 55 and 404 of the Laws of the 1982 constitutional.

Robert B. Davidson, of counsel (Baker & McKenzie, attorneys) for the plaintiff-appellant-respondents

Richard G. Liskov, of counsel (Melvyn R. Leventhal with him on the brief; Robert Abrams, attorney) for the defendants-respondents

Harold L. Fisher, of counsel (Raymond C. Green and Fisher & Fisher, attorneys) for the defendants-respondents-appellants other than Lillian Roberts

Richard L. O'Hara, Robert A. Kennedy and David Westermann, Jr. of counsel (Colleran, O'Hara, Kennedy & Mills, P.C., attorneys) for New York State AFL-CIO as *Amicus Curiae*

ALEXANDER, J.

By the enactment of Chapter 55 of the Laws of 1982, the Workers' Compensation Law (WCL) was amended to mandate that the State Insurance Fund (SIF or Fund) transfer $190 million dollars to the general fund of the State by March 1, 1983, and to provide for future transfers. A new section 87-f of the WCL provided for an annual "dry appropriation" of $190 million dollars for each year after 1983. The SIF would include the $190 million dollars in its budget request and the Governor was required to include the request in his budget bill. The $190 million dollars would be appropriated for the SIF in the State budget, but none of this appropriation would be actually paid, unless the following year's State budget failed to make the same appropriation. The amendment further provided that such appropriation was to be deemed an "admitted asset of the State Insurance Fund (§ 87(f)(2)) and any transfer of monies by the State Insurance Fund to the State's general fund was to be deemed a "proper and prudent legal undertaking for any State officer with responsibility

for the custody and investment of the assets of the Fund ..." (*Id.*). Other provisions of Chapter 55 immunized and indemnified State officers from liability for such transfers.

In order to maintain the solvency of SIF following the transfer of these monies to the general fund, Chapter 404 of the Laws of 1982, provided, among other things, for the first $190 million dollar appropriation. None of this appropriation could be expended, however, if other assets of SIF, which were not part of reserves for claims or losses, were available. Moreover, a certificate of approval had to be issued by the Director of the Division of the Budget in order for any expenditures to be made from such appropriation.

The plaintiffs, Methodist Hospital of Brooklyn (Methodist), Accident Prevention & Safety League, Inc., (Accident) and Nagel, Inc., are employers insured by SIF under Workers' Compensation insurance policies. In a declaratory judgment action commenced in April, 1982, they challenged the constitutionality of this legislation on several Federal and State grounds. They allege that it constitutes an impairment of their contractual obligations with the SIF and thus violates Article I, Section 10 of the United States Constitution; that it provides for a taking of private property without due process of law in contravention of the guarantee of the Fourteenth Amendment to the United States Constitution and Article I, Section 6 of the State Constitution; that it constitutes an unlawful intrusion upon the discretion of State officials in violation of Article V, Section 6 of the State Constitution; that it constitutes a loan or gift of the State's credit in violation of Article VII, Section 8(1) of the State Constitution; that the legislation creates a debt of the State in violation of Article VII, Sections 9 and 11 of the State Constitution; and that the legislation constitutes an unlawful appropriation scheme in violation of Article VII, Section 7 of the State Constitution. They also contend that because interest will not be paid on the transferred funds, SIF's income will be lowered, resulting in a loss to the Fund. In order to offset such loss, they argue, SIF will have to raise premiums to policyholders, which raises would constitute a *de facto* tax that violates Article II, Section 22 of the State Constitution.

The action is brought against the State Insurance Fund, its Commissioners, its Executive Director and its Supervising Actuary (collectively, the Fund or SIF) and also against the State of New York and the Commissioner of Taxation and Finance (collectively, the State). The State answered denying the constitutional challenges alleged by plaintiffs. SIF's answer essentially denies information and belief with respect to the constitutional challenges alleged in the complaint as well as the cross-claims against the State for a declaratory judgment as to the constitutionality of Chapters 55 and 404 of the Laws of 1982.

Following joinder of issue, plaintiffs moved for summary judgment. SIF joined in and supported that motion. In addition to adopting the arguments advanced by plaintiffs, SIF asserted that its funds are "fiduciary funds" under State law and that their policies of insurance constitute contracts under which the policyholders have present, tangible and vested property interests which are held for the benefit of the insureds. The State cross-moved for summary judgment. In a thoughtful and careful opinion, Special Term denied the plaintiff's motion and granted the State's cross-motion, declaring Chapters 55 and 404 of the Laws of 1982 constitutional. We agree and therefore affirm.

We begin our discussion, as did Special Term, with the acknowledgment that "there is a simple, but well founded, presumption that an act of the legislature is constitutional and this presumption can be upset only by proof persuasive beyond a reasonable doubt. (*Montgomery v. Daniels*, 38 NYS2d 4; *Matter of Malpica-Orsini*, 36 NY2d 568), *Hotel Dorset Company v. Cultural Resources*, 46 NY2d 358, 379. "The burden of showing the unconstitutionality of a statute or (sic) course rests on the party which attacks its validity (*Matter of Van Berkel v. Power*, 16 NY2d 37, 40) and every legislative enactment carries a strong presumption of constitutionality (*Barden's Co. v. Baldwin*, 293 U.S. 194, 209; *Patterson v. University of State of New York*, 14 NY2d 432, 438)." *Cook v. City of Binghamton*, 48 NY2d 323, 330. Indeed, as Judge Cooke (now Chief Judge) pointed to in his dissent in *Scaglione v. Levitt*, 37 NY2d 507, 515, "Every legislative enactment is clothed with an exceedingly strong

presumption of constitutionality (citation omitted) accompanied by a further presumption that the legislature has investigated and found facts necessary to support the legislation. (citations omitted) The party alleging unconstitutionality has a heavy burden, one of demonstrating the infirmity beyond a reasonable doubt, and only as a last resort will courts strike down legislative enactments on the ground of unconstitutionality.

Critical to the validation of plaintiffs' claims of unconstitutionality is a determination of the status of the State Insurance Fund and the nature of the interest, if any, of the plaintiffs in the surplus moneys of the Fund.

It is clear, as the courts have consistently held, as the legislature no doubt was well aware, that the State Insurance Fund is a state agency. After considering the purposes and functions of the Fund in the light of its origin and development and examining the structure of the Fund, this court, long ago, concluded that the legislature intended to shelter the Fund beneath the mantle of the State's sovereign immunities, and held that "the inextricable meshing of the fund into the basic administration of the Workmen's Compensation Law and its control and direction by the State, reflect a legislative intent to make the fund a State agency with the sovereign powers claimed (by the State Insurance Fund)." *Matter of State Insurance Fund v. Boyland*, 282 AD 516, 523 aff'd no. opn, 309 NY 1009. And while it may be true that *Boyland* concerned a somewhat narrow question of whether or not the property of the Fund was exempt from property tax, we noted in *Boyland*, at p. 524 that "A number of decisions have held, in various contexts, that the fund is a State agency." We cited *Cardinal v. State of New York*, 304 NY 400 (holding that an action on an insurance policy issued by the State Insurance Fund was properly brought against the State itself, in the Court of Claims); *Skakandy v. State of New York*, 188 Misc. 214, aff'd 274 App. Div. 153, aff'd 298 NY 385 (holding that tort actions against Commissioners of the State Insurance Fund must be brought in the Court of Claims because such Commissioners are officials and agents of the State). (See also *Cahill v. Tremaine*, 245 AD 773, aff'd no opn. 269 NY 573

[compensation of SIF employees subject to legislative reduction since paid from State moneys]; *State Insurance Fund v. Rosenshield*, 179 Misc. 180 [SIF not subject to suit in Municipal Court because it is a state agency]; *State Insurance Fund v. Lapidus*, 182 Misc 368 [Former CPA 292-1 inapplicable to require examination before trial of SIF, a state agency]; *State Insurance Fund v. Dinowitz*, 179 Misc. 278 [SIF Commissioners entitled to trial preference because of State Officer status.]; *Solomon v. Kennedy*, 38 Misc. 2d 1090 [SIF cannot be impleaded in Supreme Court because it is a State agency]).

Appellant's citation to *Commissioners of the State Insurance Fund v. Low*, 3 NY2d 590, to support the argument that the Fund should not be considered a State agency in the context of the present litigation is not persuasive.

As made clear in that case by the Appellate Division at p. 529 of 285 App Div.: "[T]he legislature considered the Fund to be the real owner of any subrogated action" and "intended the Fund to be treated *for all insurance purposes* the same as a private carrier." (emphasis added) The Court of Appeals, in affirming the denial of the motion to dismiss the Fund's complaint, based on a collateral estoppel defense, observed that "... while it is not a separate corporation and while it is an agency of the State in one sense [the Fund] is nevertheless treated by the statutes as a separate insurance business ... and that especially in *litigations*, it is to be considered an entity separate from the State itself." (*Commissioners of State Insurance Fund v. Low*, 3 NY2d 590, 595) (emphasis and bracketed material added). In the circumstances of that case, the Court of Appeals appropriately found that there was ". . . no particular pertinence here of *Matter of State Ins. Fund v. Boyland*, (300 NY 1009)". *id* 596.

We treat with the Fund here, however, not for "insurance purposes" or "in litigation" as the owner of a subrogated claim, but rather, in respect to the exercise of the sovereign power of the State in respect to a State agency. Indeed the very nature and structure of the SIF bespeaks of its identity as a State agency.

All of its eight Commissioners, including the *ex officio* members, the State Commissioner of Labor and the State Commissioner of Health, are appointed by the Governor, with the advice and consent of the Senate. All of its top executive officers, the Executive Director, the General Attorney, the Secretary and Medical Director are members of the exempt class of civil service and are appointed by the Commissioners for fixed terms. All other employees are subject to Civil Service requirements in respect to appointment, promotions and transfers. (cf. *Collins v. Manhattan & Bronx Surface Transit Operating Authority*, (MABSTOA) ____ NY2d ____ Case 46, Slip opinion June 12, 1984. The Commissioner of Taxation and Finance is the custodian of the monies and investment assets of the Fund and has the authority to deposit any portion of the Fund's moneys not needed for immediate use, in the manner and subject to all provisions of law respecting the deposit of other State funds.

Moreover, there can be no doubt ". . . that the Workmen's Compensation Law blueprints the administration of an indubitable governmental function, and that the Fund is a primary and essential actor in such administration. . ." *Boyland*, *supra*, p. 521. The statutory provisions respecting the composition of the Fund, discussed above and the further requirement of the submission of quarterly estimated budgets by the Fund to the Director of the Budget for his approval with the additional requirement of his approval for administrative expenditures in excess of those specified in the budget, the requirement that none of the funds of the SIF may be paid, expended or refunded except upon audit by the Comptroller, make clear that ". . . the Legislature intended to integrate the fund as a necessary and integral part of a carefully planned and developed structure for the administration of the Workmen's Compensation Law; and that it designedly lodged this entire structure in the State Department of Labor." *Matter of State Insurance Fund v. Boyland*, 282 App. Div., 516, 523, *supra*.

Any residual doubt as to the status of SIF as a State agency subject to the broad scope of the Legislature's power to enact

laws concerning Workers' Compensation, is dispelled by Art. I, Sec. 18 of the New York Constitution which provides, in pertinent part "Nothing contained in this constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees" . . .". *Crosby v. State of New York Workers' Compensation Board*, 57 N.Y.2d 305; *Matter of Schmidt v. Wolf Contracting Co., Inc.* 269 App Div. 201 aff'd 295 NY 748, 269 App Div. 201 aff'd 295 NY 748, *Barrencotto v. Croker Saw Co.*, 266 NY 139, *Gormeley v. NY Daily News*, 30 AD2d 16, aff'd 24 NY2d 867. And indeed, the Legislature has heretofore exercised its power over the SIF and the disposition of monies of the Fund. The SIF was required by legislative enactment in 1975 to invest its funds in obligations of the New York City Municipal Assistance Corporation, the City of Yonkers and certain State public benefit corporations. (See WCL Sections 87-a, 87-6 and 87-e). These mandated investments have never been challenged and reinforce the fact that SIF funds are State funds (*Cahill v. Tremaine*, 245 App. Div., 773, aff'd no opn. 269 NY 573) subject to the control of the Legislature. The fact that these legislative mandates referred to "investments" of SIF funds, as opposed to a transfer to the general fund in no way diminishes the power of the Legislature to exercise control of SIF and its funds.

Plaintiffs argue, however, that even if the SIF is a State agency, the challenged legislation is none-the-less an outright seizure of funds held by the State in a "fiduciary" capacity, which are not raised by taxation, but are funds in which they, as policyholders have a beneficial property interest deriving both from their policies of insurance and the specific covenants set forth in the WCL. Thus, they contend that the challenged legislation takes their property without compensation in contravention of the Fourteenth Amendment to the U.S. Constitution and Article I § 6 of the New York State Constitution, impairs their contractual obligations with SIF and violates various other provisions of the New York State Constitution.

Special Term appropriately rejected these arguments, as do we. Turning first to the arguments addressed to claimed violation of

the New York State Constitution, we observe that the sweep of § 18 of Article I of the State Constitution is extraordinarily broad and has been held to insulate the WCL and legislative enactments in respect thereto from claims of violations of other provisions of the State Constitution. *Crosby v. Workers' Compensation Board, supra*; *Wolf Contracting Co., v. Schmidt, supra*; *Barrencotto v. Crocker, supra*; *Xontrakos v. Long Island College Hospital*, 47 AD2d 500 *aff'd* 39 NY2d 1026. In addition, it has long been clear that the Legislature retains broad powers over the Executive under the State Constitution subject to such limitations as are specifically set forth in the Constitution (Art. V § 3; *Stanton v. Board of Supervisors of the County of Essex*, 191 428) none of which limitations are violated by the challenged legislation.

Thus, the claim that Chapters 55 and 404 implicitly create a loan or gift of the State's credit in violation of Article VII § 8(1) of the State Constitution is without merit. Initially, it is noted that the Fund is not an "individual or public or private corporation or association or private undertaking" (Art. VII § 8(1)). Moreover, as pointed out earlier, the Fund is itself a State agency. Therefore, this provision does not apply to it. *Board of Supervisors of Cayuga County v. State of New York*, 153 NY 279. The Court of Appeals pointed out in *Wein v. Levitt*, 42 NY2d 300, at p. 306, that: "That provision (Art. VII § 8(1)) seeks to prevent the State from loaning its credit to a public corporation with the concomitant possibility that the State might ultimately pay the corporation's obligations."

The contention that Chapter 55 creates a debt from the State to the Fund in violation of Article VII §§ 9 and 11 is likewise without merit. Again, such argument is predicated upon the assumption that the Fund is not a State agency, a contention we have rejected. As recognized by appellants and as articulated by the Court of Appeals in discussing Article VII § 11 in *Wein, supra*, at 304: "The danger sought to be met by constitutional restrictions (of Article VII) was the overburdening of future generations by the incurring of long-term debt for capital improvements. The danger was first recognized by the practice

of subsidizing canal and railroad construction only to have the transportation companies unable later to pay their debts." Thus § 11 specifically provides that ". . . no debt shall be hereafter contracted by or in behalf of the State, unless such debt shall be authorized by law, for some single work or purpose, to be distinctly specified therein." The provision for the annual appropriation of $190 million dollars to insure the solvency of SIF following the transfer of a like sum to the State's general fund can hardly be equated with "subsidizing a canal or railroad construction" or "the incurring of long-term debt for capital improvement."

Interestingly, appellants argue that, at the same time that Chapters 55 and 404 create an illegal "loan" of the State's credit and a "long-term debt" they also create an "appropriation scheme" violative of § 7 of Article VII. That section provides that no money shall be paid from the ". . . State treasury or any of its funds, or any funds under its management, except in pursuance of an appropriation, by law; nor unless such payment be made within two years next after the passage of such appropriation act. . ." . The appropriations authorized by the challenged legislation do not in any way violate this provision, since if no appropriation is passed in any future year, the amount appropriated for and encumbered during the preceding fiscal year is to be paid forthwith. Thus any moneys to be paid under any such appropriation must be paid, if at all, within two years next after the passage of such appropriation action.

Nor does Chapter 55 constitute an unconstitutional legislative incursion upon the discretionary powers of State officials with responsibility for the SIF in violation of the New York State Constitution as argued by appellants. Their reliance on *Patterson v. Carey*, 41 NY2d 714 and *Sgaglione v. Levitt*, 37 NY2d 507, in support of this contention is misplaced. Indeed, the court in *Patterson* expressly recognized that the Legislature was given the power, under the Constitution to regulate the Comptroller's duties in regard to political subdivisions of the State, but not public benefit corporations. Public benefit corporations are not political subdivisions of the State. (*See Collins v. Manhattan*

& Bronx Surface Transit Operating Authority, (MABSTOA) ____ *NY2d* ____, *supra.*) Thus, the legislature could not constitutionally infringe upon the State Comptroller's exercise of this discretionary power to supervise the financial accounts of the Jones Beach State Parkway Authority, a public authority. So too, in *Sgaglione*, the issue addressed by the court was the authority of the Legislature to direct and control the Comptroller's discretion in making investments of funds belonging to various State pension and retirement systems in light of the non-impairment provisions of Article V § 7 of the State Constitution. The statutes under attack here do not deal with the investment discretion of the SIF. Rather, they merely direct the transfer of funds internally within the State's financial structure.

Plaintiffs-appellants' due process and contract impairment arguments based upon the U.S. Constitution are equally unavailing to establish the unconstitutionality of Chapters 55 and 404.

The SIF funds are State funds and the plaintiffs have no constitutionally protected property interests therein; certainly not merely by reason of the fact that the moneys in the fund derive from premiums paid by employer-policyholders and the interest earned thereon. Neither do any such property rights accrue from the fact that SIF funds are classified as "fiduciary funds." Section 70 of the State Finance Law, relied upon by plaintiffs does no more, in this regard, than to direct the Comptroller to establish "seven fund types" ranging from "(a) general fund" to "(g) fiduciary funds" into which all State funds were to be classified (§ 70 State Finance Law, L. 1981 ch 405). Moreover, the Comptroller is authorized to reclassify such funds, as is determined by him to be necessary and appropriate and in connection therewith he is only required to give notice to his actions and the reasons therefor to the Legislature and the Governor. (State Finance Law § 70(2)). Such discretion to classify and reclassify "all funds of the State" which are "not classified by law" into a fund type for "financial reporting purposes" is inconsistent with and totally refutes any claim that classification of these funds as "fiduciary funds" creates a constitutionally protected property right in the SIF funds held by the plaintiffs.

Nor do any such property rights derive from any "promises" or "guarantees" contained in the policies of insurance or any provision of the WCL. The contention of plaintiffs that they possess certain contractual rights in respect to the level of insurance premium rates and in respect to the required amount of reserves and the disposition of such reserves which are impaired by Chapter 55 and 404, is not supported by either the facts or the law. Clearly, nothing in the policies of insurance themselves can fairly be interpreted as conferring any such contractual rights. Nor can it reasonably be said that any of the provisions of WCL establish any such property interest in the funds of SIF nor impose any contractual obligations upon the State in respect to the funds of SIF, which are substantially impaired by the challenged legislation.

The general rule, as enunciated by the Court of Appeals in this regard is that ". . . a statute will itself be treated as a contract when its language and the circumstances manifest a legislative intent to create private rights of a contractual nature enforceable against the State." *Cook v. City of Binghampton*, 48 NY2d 323, 330. "[B]efore a law may be deemed to amount to a contract between the State and a third party, the statutory language must be examined and found to be 'plain and susceptible to no other reasonable contruction' than that a contract was intended. (citations omitted). 'It is never to be assumed . . . that the State has . . . fettered its power in the future, except upon clear and irresistible evidence that the engagement was in the nature of a private contract as distinguished from a mere act of general legislation; and that such, in the particular instance, was the actual and deliberate intention of the State authorities (citations omitted)." *Pennsylvania Railroad Company v. State of New York*, 11 NY2d 504, 511-512.

We find nothing in the language of those provisions of the WCL relied upon by plaintiffs that constitute "clear and irresistible evidence" that the Legislature intended to "fetter its power in the future" in respect to the uses to be made of SIF funds or in respect to the level of reserves to be maintained for policy claims or premium rates for the policies issued by SIF or the

payment of dividends. Premiums to be charged are required to be set at the "lowest possible rates" "consistent with reasonable reserves and a surplus" and "dividends may be credited or paid" or may be declared. This language is clearly permissive, not mandatory, and does not evince a legislative intent to "create private contractual or vested rights." (*Penn RR Co.*, 11 NY2d 504, *supra*).

This language is more reasonably read as declarations of legislative policy rather than ". . . manifest(ing) a legislative intent to create private rights of a contractual nature enforceable against the State . . . " *Cook v. City of Binghampton*, 48 NY2d 323, 329-330. That certain benefits may have enured to plaintiffs and other policyholders as a result of the implementation of those policy declarations, does not transform them into contractually created property rights enforceable against the State.

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. . ." *Roth v. Board of Regents*, 408 US 564, 577.

These policy declarations and their implementation ". . . may open a chance for benefits to those who comply with its conditions, but it does not address them and therefore it makes no promise to them. It simply indicates a course of conduct to be pursued until circumstances or its views of policy change. It would be quite intolerable if parties not expressly addressed were

to be allowed to set up a contract on the strength of their interest in an action on the faith of a statute, merely because their interest was obvious and their action likely, on the face of the law." *Penn. R.R. Co. v. State of New York*, 11 NY2d 504, 511-512.

Nor do we find any language in the WCL, comparable to that found in *Patterson v. Carey*, 41 NY2d 714 and *United States Trust Co. v. New Jersey*, 431 U.S. 1, two cases relied upon heavily by plaintiffs, sufficient to warrant finding that private contract rights are created by the WCL. In both *Patterson* and *United States Trust* language is used that unmistakably manifests a legislative intent to create private rights of a contractual nature, enforceable against the State. In *Patterson*, the State "covenanted" with the holders of Authority bonds and "pledged to vest the Authority with the power to raise tolls" and "not to limit or alter the rights vested in the Authority to the detriment of Authority bondholders." *Patterson v. Carey*, *supra*; Public Authorities Law §§ 153-b(5), 158-a).

In *United States Trust Co.*, both New York and New Jersey "covenanted" that neither State nor the Port Authority of New York and New Jersey would exceed a limit placed on the amount of Port Authority revenues that could be used to pay debts incurred as a result of mass transportation operations. The U.S. Supreme Court invalidated the repeal of this covenant by both States, holding that the covenant ". . . limited the Port Authority's deficits and thus protected the general reserve fund from depletion. . . . Its outright repeal totally eliminated an important security provision and thus impaired the obligations of the State's contract." (431 U.S. at p. 19).

Even if it were found that some level of protected contract interests in the funds of the WCL were possessed by plaintiffs, their claim of unconstitutional impairment of those contractual interests must nevertheless fail.

The threshold inquiry when considering a contract clause impairment claim is "whether the state law has, in fact, operated as a *substantial* impairment of a contractual relationship" (emphasis added). *Energy Reserves Group, Inc., v. Kansas Power*

and Light Company, ____ U.S. ____ 103 S. Ct., 697, 704-5; *Allied Structural Steel Company v. Warren Spannaus, et al.*, 438 U.S. 234, 244). And "[i]n determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past." *Energy Reserves, supra*, 103 S. Ct., at 705, citing *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357. As pointed out earlier, not only has the field of Workers' Compensation been heavily regulated by the N.Y. State Legislature in the past, the specific subject matter, the disposition of the surplus funds of WCL has been the focus of prior specific legislation. (*See e.g.*, WCL §§ 37-a, 87-b, 87-c, 87-d). Thus, the fact "that the [plaintiffs] are operating in a heavily regulated industry" and that "supervision of the industry (has been) extensive and intrusive" (Energy Reserves, 103 S. Ct. 697, 706, supra) is significant and diminishes the force of the plaintiffs' contract impairment claim. Moreover, the policies issued to the plaintiffs specifically provide that they are to be construed by reference to the WCL as it has been amended previously or shall be amended in the future. The conclusion is inescapable therefore that they knew that their contractual rights were subject to alteration by legislative amendments. That being the case, their "reasonable expectations have not been impaired" by Chapters 55 and 404. *Energy Reserves Group Inc., v. Kansas Power and Light Company, supra.* Moreover, plaintiffs have failed to establish that any impairment that might be found to exist as a result of the enactment of Chapters 55 and 404, is in any sense, substantial. While the "severity of the impairment measures the height of the hurdle the State legislation must clear. [M]inimal alteration of contract obligations may end the inquiry at its first stage." *Allied Structural Steel v. Spannaus, supra*, 438 U.S. at 245.

Here, there is no claim or evidence of any retroactive impact of the challenged legislation on any contract rights plaintiffs may possess, and projections of any future premium increase are minimal and assume that there will be no diminution in discounts or dividends to the policyholders. In addition, it does not appear that it is legally required or actuarially necessary for SIF to raise its premiums either to pay expenses and claims

or to replenish reserves for those purposes since the transferred $190 million dollars will be taken from surplus, not from reserves.

In short then, plaintiffs have failed to establish that they possess any constitutionally protected contractual rights in respect to the funds of SIF or that such rights as may exist are substantially impaired, if at all, by Chapters 55 and 404. We have considered plaintiffs other arguments and find them equally lacking in merit. Thus, we conclude that plaintiffs have failed to demonstrate any constitutional infirmities in the challenged legislation.

We have also considered their citations to authorities from other jurisdictions, purportedly dealing with a like subject. We find that these authorities are distinguishable in significant respects and therefore substantially inapposite. Initially, it is observed that in none of the cited cases from foreign jurisdictions, does it appear that it has been judicially determined that the local counterpart to our State Insurance Fund is a State agency, as is the SIF, exercising a sovereign governmental function constitutionally delegated to it. (*State Insurance Fund v. Boyland, supra*). Nor does it appear to have been judicially determined either that the funds of the compensation agencies were State funds. *Cahill v. Tremaine, supra*) or that compensation claims are enforceable against the State itself. (*Cardinal v. State*, 279 AD 326, mod. o.g. 304 NY 400); cf *Moran v. State ex rel Derryberry*, 534 P2d 1282 (Oklahoma)). Indeed in Oregon and Florida, the statutes creating Workers' Compensation plans explicitly declare that those funds are not State monies (*See Bennett v. State Industrial Acc. Com.*, 203 Ore. 275, and *State v. Florida State Improvement Co.* 158 Fla. 743, 30 So.2d 97).

We conclude that Chapters 55 and 404 of the Laws of 1982 do not affront either the U.S. Constitution or the Constitution of the State of New York and that Special Term's order declaring them constitutional should be affirmed.

Accordingly, the order of the Supreme Court, New York County (William P. McCooe, J.) entered February 24, 1983,

which denied plaintiffs' motion for summary judgment and granted defendants, Edward V. Regan, Roderick Chu and the State of New York for summary judgment declaring Chapters 55 and 404 of the Laws of 1982, constitutional should be affirmed without costs.

All concur except
Kassal, J.
who dissents in an Opinion.

KASSAL, J. (Dissenting)

I disagree with the conclusion by the majority and find that chapters 55 and 404 of the Laws of 1982, mandating a transfer of $190 million from the State Insurance Fund to the general fund of the State, are unconstitutional, amounting to a deprivation of property without due process and a taking of private property for public purpose without just compensation, in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, §§ 6 and 7(a) of the N.Y. Constitution. In addition, in my view, the challenged legislation constitutes an impairment of contractual obligations, invalid under U.S. Constitution, Article I, § 10.

The legislation at issue on this appeal directed the transfer of $190 million from the State Insurance Fund to the general fund of the State on March 1, 1983 and provided for future annual transfers in the same sum. Through an amendment to Workers Compensation Law § 87-f, there was provision for an annual "dry" appropriation of $190 million by the State which was deemed an "admitted asset of the state insurance fund..." Concededly, the annual appropriation effected a transfer of a substantial sum to the State to be used for general revenue purposes, interest free, and with no real obligation to make repayment. As argued by appellants, the transfer results in the loss to the Fund of substantial monies for future investment and does thereby have a negative impact upon the ability of the Fund

to offer discount premium rates which, in the past, had been offered to preferred insureds. Inasmuch as Workers Compensation Law § 89 mandates premiums be fixed "at the lowest possible rate consistent with the maintenance of a solvent fund and of reasonable reserves and surplus," it is patently clear that the annual transfer of $190 million would effect a substantial reduction of income from future investment, which, in turn would result in a loss of interest to the Fund of about $30,000,000 each year. This will directly increase future premium rates.

The majority places undue emphasis upon the finding that the State Insurance Fund is a state agency and, from that, concludes that all of its assets are state funds which may be used as the Legislature deems appropriate. While I agree that the Fund is a state agency, of significance is the fact that it is funded entirely through private sources, namely, employers, and, in its operation and underlying purpose, has many of the attributes of a private insurance carrier. Employers who secure compensation coverage through the Fund have a basis for concluding that premium payments will be used in accordance with the statutory directives, including Workers Compensation Law § 76, which provides that the Fund "shall consist of all premiums received and paid into the fund, of property and securities acquired by and through the use of moneys belonging to the fund and of interest earned upon moneys belonging to the fund and deposited or invested***" and § 85 thereof, which makes the Commissioner of Taxation and Finance "the custodian of the state insurance fund" and permits the Commissioner to "deposit any portion of the state fund not needed for immediate use," directing that interest earned "shall be collected by him and placed to the credit of the fund." In addition, Workers Compensation Law § 76 requires that funds collected "shall be applicable to the payment of losses sustained on account of insurance, to the payment of expenses... and to the payment of premiums for reinsurance..." The statutory scheme does not authorize the use of such funds for general state purposes nor is there any such legislative intent shown. The legislation at issue here subverts the underlying statutory scheme by diverting funds

from their sole intended purpose, i.e., the payment of claims and investment.

Stripping the statutory structure to its bare essentials and taking into account that the Fund operates as a mutual insurance pool, solely funded by premium payments by policyholders and money earned on investments from employer contributions, I fail to perceive the rationale of the majority in concluding that plaintiffs, as insureds, do not have a property interest in the Fund's surplus. The policies create contractual rights which have been infringed upon and the substantial loss of assets each year will have a negative impact upon the ability of the Fund to offer reduced premiums, as in the past. In addition, while the payment of dividends is a discretionary act, it is undisputed that the Fund did maintain a long-standing practice of paying dividends based upon available surplus. The loss of funds and the consequential future loss of income will have an adverse effect upon the ability to continue that policy.

In short, the legislation amounts to an improper diversion of Fund assets from their intended purpose, contrary to the reasonable expectation of insured employers, who paid premiums to purchase insurance coverage, not to fund the general treasury of the State. Taking cognizance of the fact that the funds are held in a fiduciary capacity and their use and purpose earmarked by express statutory provision, no basis exists to sustain the legislation which, in effect, amounts to a raid upon the Fund. By analogy, the position of the majority would create a precedent which would inevitably lead to sustaining a legislative diversion of other specially earmarked funds, such as public pension and retirement funds. In either situation, there would be a taking of property without due process and without just compensation and, which in my view, is constitutionally infirm.

Nor may the legislation be sustained on the majority's finding that the State guarantees payments to injured claimants. The fact that the Fund is secured by the general assets of the State is not at all dispositive on whether those assets may be used for other State purposes. It is reasonable to conclude that

any payment required of the State as guarantor, will be thrust upon the insured employees by the higher premiums or surcharges. Moreover, the State's status as guarantor does not afford it a license to appropriate the Fund's assets, which are derived solely from private sources and investment. The appropriation, essentially directing the use of assets contrary to the express purpose for which the Fund was created, impinges upon the contractual rights of the policyholders and constitutes a taking of property without due process or just compensation. If additional surplus exists, more than reasonably necessary to satisfy anticipated claims, that surplus ought to be available in the future for investment purposes or distributed to policyholders in the form of additional dividend payments or reduced premiums, within the discretion of the State Insurance Fund, consistent with the statutory scheme of the Workers Compensation Law.

Accordingly, the judgment, Supreme Court, New York County (William P. McCooe, J.), entered February 24, 1983, denying plaintiffs' motion for summary judgment, declaring as constitutional chapters 33 and 404 of the Laws of 1982, should be reversed, on the law, the motion granted, the cross-motion denied and the legislation declared to be unconstitutional.

Order filed.

Decision of the Court of Appeals, February 21, 1985

. X

METHODIST HOSPITAL OF BROOKLYN, ET AL.,

Appellants-Respondents,

v.

THE STATE INSURANCE FUND, ET AL.,

Respondents-Appellants,

EDWARD V. REGAN, as Comptroller of the State of New York, et al.,

Respondents.

. X

Order affirmed, without costs. Opinion by Judge Meyer. Chief Judge Wachtler and Judges Jasen, Simons and Kaye concur. Judge Alexander took no part.

MEYER, J.

The transfer of $190 million from the State Insurance Fund to the general fund of the State does not violate the Federal or State Constitution. The order of the Appellate Division should, therefore, be affirmed, without costs.

I

The purpose of the present action is to obtain judgment (1) declaring unconstitutional section 92(2) of chapter 55 of the Laws of 1982, which directed the State Insurance Fund (SIF) to transfer to the State's general fund $190 million by March 1, 1983, and (2) requiring the return of that sum plus interest from March 1, 1983 to the SIF. The SIF exists "for the purpose of insuring employers against liability for personal injuries or death sustained by their employees [worker's compensation liability], including liability * * * imposed upon employers by reason of a suit or claim brought against the employer by another to recover the amount of damages obtained from such other by an employee of the employer for injuries or in case of death by his dependents for death sustained by such employee arising out of and in the course of his employment [so-called 1B coverage]" (WCL § 76[1], bracketed material added).

Section 86 of chapter 55 added a new section 87-f to the Workers' Compensation Law which in its subdivision 1 establishes the mechanism for annual so-called "dry" appropriations to the SIF of $190 million and provides in its subdivision 2 that any appropriation thus made "shall be deemed an admitted asset to the fund" and that any transfer of moneys from the SIF to the State's general fund "is deemed a proper and prudent legal undertaking for any state officer with the responsibility for the custody or investment of the assets of the fund." Subdivision 1 requires inclusion in each year's budget bill for the next fiscal year of $190 million for the SIF and provides that if in any year the Governor fails to do so or the Legislature fails to appropriate the budgeted amount, the amount appropriated for the preceding fiscal year "shall be payable forthwith to the fund on the first day of July of such year." Section 93 of Chapter

55 requires that any action relative to the foregoing be brought against the State and holds harmless every state officer responsible for the custody or investment of the SIF, as well as persons employed by or who advise such an officer, from liability by reason of the transfer directed or other provisions of the act. Chapter 404 of the Laws of 1982 made the necessary $190 million appropriation to the SIF "for the purpose of maintaining the solvency" of the fund, but provided "that no expenditure may be made from this amount if other assets of such fund not part of reserves for claims or losses are available," and required issuance and filing of a certificate of approval by the director of the division of the budget before expenditure from the appropriation can be made. Provisions similar to those of chapter 404 have been contained in the appropriation bills for 1983 (ch 50) and 1984 (ch 50) under the heading "Insurance and Securities Funds Reserve Guarantee."

The plaintiffs are two non-profit corporations and a commercial corporation who are employers insured by the SIF.[1] Defendants are the SIF, its Commissioners, its Supervising Actuary (SIF-defendants), the State Comptroller, the Commissioner of Taxation and Finance and the State (State-defendants). The complaint in separate causes of action asks that chapter 55 be declared unconstitutional because it (1) impairs contractual obligations in violation of article 1, section 10(2) of the Federal Constitution; (2) constitutes a deprivation of property without due process and a taking without just compensation in violation of the Fifth Amendment of the Federal Constitution and article 1, sections 6 and 7, of the New York Constitution; (3) constitutes an improper intrusion by the Legislature upon discretionary powers of state officials of the Executive Branch in violation of article 3, section 1, and article 4, section 1 of the State

---

[1] Unlike the claim advanced in *American Insurance Association v. Chu* (___ NY2d ___ [decided herewith]), the claim presented by plaintiffs herein is not premature, for the transfer of $190 million from the SIF to the State will reduce by some $134 million over the next five years accretions to the Fund through interest, in which plaintiffs claim a present contract and property right.

Constitution; (4) creates a loan of state credit in violation of article 7, section 8 of the State Constitution; (5) creates a debt without providing that it be evidenced by a note in violation of article 7, section 11 of the State Constitution; (7) constitutes an appropriation which is not required to be expended within two years of passage and is fixed by reference to other laws in violation of article 7, section 7 of the State Constitution; and (8) in depriving policyholders of the income that otherwise would have been earned constitutes a *de facto* tax on employers in violation of article 3 of the State Constitution. The State-defendants' answer asserts affirmative defenses as to each cause of action denies that the SIF is independent of the State and alleges that its reserves and investments are the property of the State. The SIF-defendants' answer admits the issuance of policies to the plaintiffs and that absent transfer of $190 million to the general fund of the State income would be earned by the SIF, but otherwise denies knowledge and information and refers the court to the various constitutional and statutory provisions involved. They also cross-claim for judgment declaring whether chapter 55 and 404 are unconstitutional.

Plaintiffs moved for summary judgment and the SIF-defendants not only joined in and supported that motion[2] but also argued, as do plaintiffs, that SIF funds are "fiduciary funds" within the meaning of State Finance Law, section 70 and, therefore, are property of the policyholders rather than state funds. The State-defendants cross-moved for summary judgment. Special Term, in a thoughtful opinion (117 Misc.2d 178), denied plaintiffs' motion, granted the State-defendants' cross-motion and entered judgment declaring the provisions of chapters 55 and 404 relating to the $190 million transfer by the

---

[2] The State-defendants argue that, the SIF being a state agency, the SIF-defendants have no standing to challenge the constitutionality of the statute. The Commissioners are, however, required by WCL § 77 to be policyholders insured in the SIF and to take a constitutional oath of office. Thus, notwithstanding the immunity and indemnity provisions of section 93 of chapter 55 of the Laws of 1982, they have standing (*Board of Education v. Allen*, 20 NY2d 109, affd 392 US 236).

SIF constitutional. The Appellate Division, in an exhaustive opinion (102 AD2d 367), affirmed, one Justice dissenting on the ground that those insured by the Fund have a property interest in its surplus because "the Fund operates as a mutual insurance pool" (102 AD2d at 385). We agree with the result and much of the opinions written below, and write primarily to clarify the status of the Fund as a state agency for all of whose liabilities the State is responsible, rather than a mutual insurance pool. That conclusion, explicated in Part II of this opinion, because it negates the conception of a property or contractual interest of Fund policyholders in its surplus, answers the contract impairment, due process, just compensation and *de facto* tax contentions advanced by plaintiffs and the SIF-defendants. For other reasons set forth in Part III below, we conclude further that the statutes in question violate none of the other state constitutional provisions on which plaintiffs and the SIF-defendants rely.

II

Nothing in article 6 of the Workers' Compensation Law expressly establishes the SIF as a mutual insurance organization. A mutual insurance company is organized and operated for the benefit of its policyholders who are by virtue of their policies members of the company (Couch, Insurance [2d ed], § 19.14). It is run by a board of directors elected by the members (Insurance Law, § 56); its members are, absent approval by the Superintendent of Insurance of its issuance of nonassessable policies, subject to contingent mutual liability for assessment should the assets of the company be insufficient to meet liabilities (Insurance Law, § 57; 30 NY Jur Insurance, §§ 791, 792), and are entitled to dividends from surplus as may be declared by the board of directors (Insurance Law, §§ 58, 197, 345). In some such companies the payment of annual dividends is within the discretion of the directors (Insurance Law, §§ 57, 318, 323, 346); in others, annual payment of dividends is mandated by statute (Insurance Law, § 216). When a dividend is in fact declared, it must be equitably apportioned among the policyholder-members, its purpose and effect being to reduce *pro tanto* the

cost of insurance to the policyholder (*Kern v. John Hancock Ins. Co.*, 8 NY2d 833, affd 8 AD2d 256, 259; *Rhine v. New York Life Ins. Co.*, 273 NY 1, 13), but with the possible exception of companies whose annual dividends are mandated by statute, the right to receive a dividend when declared creates no trust or property interest of the policyholder in the surplus (see *Grobe v. Erie County Mutual Ins. Co.*,) 69 NY 613, affd 39 App Div 185; *Uhlman v. New York Life Ins. Co.*, 109 NY 421; *Fidelity & Cas. Co. of N.Y. v. Metropolitan Life Ins. Co.*, 42 Misc.2d 616).

When one turns to the provisions governing the SIF, it is at once apparent that there are more dissimilarities than likenesses between it and a mutual insurance company. The only reference to mutual companies in article 6 of the Workers' Compensation Law, which governs the SIF, is in section 99, which requires the Commissioners to report to the Superintendent of Insurance "at the same time and in the same manner as is required from mutual employer's liability and workmen's [worker's] compensation corporations." But unlike mutual insurance companies, the SIF was created and exists as a state agency within the Department of Labor (WCL § 76[1],[3] its policyholders are not members and have no vote or say in administration, the Fund being administered by commissioners appointed by the Governor with the advice and consent of the Senate (*id.*, § 77) and the Commissioner of Taxation and Finance being custodian of the Fund (*id.*, § 85). Policyholders in the SIF not only have no responsibility to contribute to losses,[4] as do some mutual-insureds, but also are protected, as no other mutual insured is, from all claims predicated

---

[3] We agree, for the reasons expounded by the Appellate Division (102 AD2d at 372-374), that the SIF is a state agency. For the history of its creation, see *Sadigar v. State of New York* (173 Misc. 645).

[4] WCL § 53 provides that: "An employer securing the payment of compensation by contributing premiums to the state fund shall thereby become relieved from all liability for personal injuries or death sustained by his employees, and the persons entitled to compensation under this chapter shall have recourse therefor only to the state fund and not to the employer. An employer shall not otherwise be relieved from the liability for compensation prescribed by this chapter except by the payment thereof by himself or his insurance carrier.

on employee injury even if the SIF, as a fund, were to become insolvent. This results from the status of the Fund as a state agency, from the express statutory release of fund-insured-employers from liability, and from the deletion, by chapter 615 of the Laws of 1922, from the provision which is now WCL § 76(1) of the sentence included in the original enactment which read:

"Such fund shall be administered by the commission[5] without liability on the part of the state beyond the amount of such fund." The liability thus accepted by the State extends, moreover, not only to direct claims of employees but also to 1B coverage of claims against an employer by a third party to recover damages awarded a policyholder's employee against such third party (*Cardinal v. State of New York*, 304 NY 400, 405,414-416).[6] Moreover, dividends to policyholders are discretionary, not mandatory (WCL § 90: "there *may* be credited or paid to such individual member" [emphasis supplied]).

Plaintiffs argue that the provisions of section 76(1) descriptive of the Fund[7] indicate a legislative intent that policyholders

---

[5] The reference is to the Workers' Compensation Commission, as it is presently designated (see Laws of 1913, ch 816, § 3[2]).

[6] Though *Cardinal* held only the Fund liable to the policyholder, the case presented no issue concerning liability of the State as distinct from the SIF. Nor, in light of the broad language of WCL § 53 (quoted in footnote 4, *supra*) relieving an employer insured by the SIF "from *all liability* for personal injuries or death sustained by his employees," do we attach significance to the fact that WCL § 76(1) uses more explicit language as to third-party claims. *Matter of Consolidated Mut. Ins. Co. (Arcade Cleaning Contractors)* (60 NY2d 1), which dealt with the security fund under Insurance Law, section 334, is not to the contrary.

[7] The last two sentences of the subdivision read: "Such fund shall consist of all premiums received and paid into the fund, of property and securities acquired by and through the use of moneys belonging to the fund and deposited or invested as herein provided. Such fund shall be applicable to the payment of losses sustained on account of insurance, to the payment of expenses in the manner provided in this chapter and to the payment of premiums for reinsurance in any insurance corporation of the whole or any part of any policy obligations.

have a property interest in its surplus. The answer is that the statement of what the Fund shall consist of and what expenses may be paid from it simply do not deal with what is to be done with surplus, and that it is equally consistent with those descriptive provisions, when considered together with the facts that dividends are discretionary and that the State, and only the State, is responsible for payment of awards resulting from employee injury or death, either through its agency, the Fund, or from other state monies, that such surplus as may exist after payment of discretionary dividends belongs to the State, not to policyholders. The surplus being state money the State could have simply taken it with no strings attached. That it has seen fit instead to assure the solvency of the Fund through the dry appropriation mechanism established by WCL § 87-f is not inconsistent with that conclusion. It is rather a pledge or earnest of the State's intention to carry out the obligation which it has borne since the "without liability" sentence was deleted from WCL § 76(1) in 1922.

What has been said so far establishes that State Insurance Fund policyholders have no property interest in the surplus of the Fund, short of the actual declaration of a dividend by the Commissioners. Plaintiffs' impairment of contract argument is largely answered by that conclusion, but we note further our agreement with the Appellate Division (102 AD2d at 378 ff) that nothing in the statutory provisions so far referred to or in section 89's direction that "premiums in the state fund shall be fixed at the lower possible rates consistent with the maintenance of a solvent fund and of reasonable reserves and surplus" rises to the level of language "'susceptible to no other reasonable construction' than that a contract was intended" (*Pennsylvania R.R. Co. v. State of New York*, 11 NY2d 504, 511). Likewise there being neither property nor contract interest of policyholders in surplus, the effect upon them of loss to the SIF of interest on the $190 million transferred cannot constitute a *de facto* tax in violation of article 3 of the new York Constitution.

III

The remaining state constitutional grounds can be more summarily disposed of. By transferring $190 million from one state pocket (the SIF) to another (state general funds), the State has relieved the Fund's Commissioners of the necessity of exercising investment discretion with respect to part of the funds previously entrusted to them, but has done so in the exercise of its prerogative as owner of the surplus funds and, therefore, without infringing upon separation of powers. Nor by doing so has the State improperly loaned its credit to itself, or created a debt to itself. Rather it has, as already noted, simply given a pledge or earnest of its intention to carry out its obligations with respect to Fund policyholders should that become necessary.

Finally, we perceive no violation of the provisions of article 7, section 7 of the State Constitution governing appropriation bills.[8] Workers' Compensation Law, section 87-f(1), which establishes the mechanism, itself makes no appropriation. The appropriations have been made in each year by separate act (Laws of 1982, ch 404; Laws of 1983, ch 50; Laws of 1984, ch 50), each of which, without reference to any other law, fixes the amount appropriated and specifies the purpose to which the sum appropriated is to be applied. That the moneys appropriated are not available for expenditure without approval of the Director of the Division of the Budget and that no expenditure may be made of the funds if other assets of the SIF not part of reserves for claims or losses are available does no violence to the constitutional inhibition. And payment within two years next after passage of the appropriation act is assured by the provision of section 87-f(1) that requires payment of the

---

[8] The section reads: "No money shall ever be paid out of the state treasury or any of its funds, or any of the funds under its management, except in pursuant of an appropriation by law; nor unless such payment be made within two years next after the passage of such appropriation act; and every such law making a new appropriation or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object or purpose to which it is to be applied; and it shall not be sufficient for such law to refer to any other law to fix such sum."

amount appropriated in any given fiscal year if the Governor fails to budget or the legislature fails to appropriate such an amount for the succeeding fiscal year. Because such payment must be made on July 1 of the succeeding fiscal year, payment will be made, if at all, within the required two-year period.

For the foregoing reasons, the order of the Appellate Division should be affirmed, without costs.

* *

Order affirmed, without costs. Opinion by Judge Meyer. Chief Judge Wachtler and Judges Jasen, Simons and Kaye concur. Judge Alexander took no part.

Decided February 21, 1985

APPENDIX B

A. THE LEGISLATION IN QUESTION

Chapter 55, L.1982, § 92.2

Notwithstanding any other provisions of law, the State insurance fund and all state officers with responsibility for custody or investment of such fund or its assets, are authorized and directed to transfer one hundred ninety million dollars to the general fund by March first, nineteen hundred and eighty-three.

§ 87-f. APPROPRIATIONS TO THE STATE INSURANCE FUND

1. Notwithstanding any other provision of law, the state insurance fund, hereinafter referred to as the fund, and all state officers with responsibility for the custody or investment of such fund or of its assets, shall annually no later than November first in each year, submit to the director of the budget the fund's request for an appropriation of one hundred and ninety million dollars. The governor shall include such amount in a budget bill for the next state fiscal year. The state comptroller shall encumber the amount so appropriated before the end of the fiscal year for which any such appropriation is made. If for any fiscal year commencing on or after April first, nineteen hundred eighty-three, the governor fails to submit a budget bill containing an appropriation in the amount requested by the fund or the legislature fails to appropriate the amount in a budget bill submitted by the governor for such fiscal year, the amount appropriated for and encumbered during the preceding fiscal year shall be payable forthwith to the fund on the first day of July of such year in the manner prescribed by law, provided, however, that such amount shall not exceed the amount of moneys transferred to the general fund by the fund pursuant to the provisions of a chapter of the laws of nineteen hundred eighty-two.

2. It is hereby found and declared that any appropriation made as provided for in subdivision one of this section shall be deemed an admitted asset of the state insurance fund, and that

any transfer of moneys by the fund to the general fund in accordance with the provisions of a chapter of the laws of nineteen hundred eighty-two is deemed a proper and prudent legal undertaking for any state officer with the responsibility for the custody or the investment of the assets of the fund, notwithstanding any other provision of law to the contrary.

B. EXCERPTS FROM THE NEW YORK WORKERS' COMPENSATION LAW

§ 53. RELEASE FROM LIABILITY

An employer securing the payment of compensation by contributing premiums to the state fund shall thereby become relieved from all liability for personal injuries or death sustained by his employees, and the persons entitled to compensation under this chapter shall have recourse therefor only to the state fund and not to the employer. An employer shall not otherwise be relieved from the liability for compensation prescribed by this chapter except by the payment thereof by himself or his insurance carrier. The provisions of this section shall not apply to the state of New York, as an employer except to the extent that the fund has provided insurance coverage on an actuarially sound basis to the state pursuant to the provisions of section eighty-eight-c of this chapter. To the extent that the fund has not provided insurance coverage on an actuarially sound basis pursuant to section eighty-eight-c of this chapter, any state employee or other person entitled to compensation under this chapter as a consequence of personal injuries or death of a state employee shall have direct recourse therefor only to the state.

§ 76. CREATION OF STATE FUND

1. There is hereby continued in the department of labor a fund known as "the state insurance fund", for the purpose of insuring employers against liability for personal injuries or death sustained by their employees, including liability other than liability assumed by contract imposed upon employers by reason of a suit or claim brought against the employer by another to recover the amount of damages obtained from such other by

an employee of the employer for injuries or in case of death by his dependents for death sustained by such employee arising out of and in the course of his employment and to pay such damages, and of assuring to the persons entitled thereto the compensation and benefits provided by this chapter or by any act providing for compensation now or hereafter enacted by the congress of the United States of America if such liability is incident to an employment carried on in this state, and every such payment shall constitute an element of loss for the purpose of establishing premium rates. Such fund shall consist of all premiums received and paid into the fund, of property and securities acquired by and through the use of moneys belonging to the fund and of interest earned upon moneys belonging to the fund and deposited or invested as herein provided. Such fund shall be applicable to the payment of losses sustained on account of insurance, to the payment of expenses in the manner provided in this chapter and to the payment of premiums for reinsurance in any insurance corporation of the whole or any part of any policy obligations.

2. The purposes of the state insurance fund herein created are hereby enlarged to provide for the insurance by the state insurance fund of the payment of the benefits required by section two hundred four of this chapter. A separate fund is hereby created within the state insurance fund, which shall be known as the "disability benefits funds", and which shall consist of all premiums received and paid into said fund on account of such insurance, all securities acquired by and through the use of moneys belonging to said fund and of interest earned upon moneys belonging to said fund and deposited or invested as herein provided. Said disability benefits fund shall be applicable to the payment of benefits, expenses and assessments on account of insurance written pursuant to article nine of this chapter.

* * *

4. The purposes of such state insurance fund are hereby further enlarged to permit it to furnish self-insurers, as defined in subdivision three of section fifty of this chapter, representation

and services of the nature specified in paragraph (e) of subdivision one of section eighty-five-a of the insurance law and subdivision three-d of section fifty of this chapter.

§ 77. ADMINISTRATION

The state insurance fund shall be administered by the commissioners of the state insurance fund, of whom there shall be eight. The industrial commissioner and the commissioner of health shall be commissioners of such fund by virtue of their offices. The commissioners shall elect annually from the appointive members a chairman and a vice-chairman who shall act as chairman in the absence of the chairman. The ex officio commissioners may designate a deputy commissioner to act in their place and stead as a commissioner of such fund. The commissioners shall be appointed by the governor, by and with the advice and consent of the senate. They shall be policyholders insured in the state insurance fund. The commissioners shall be appointed for terms of three years each. They shall serve until their successors are appointed and have qualified. Vacancies shall be filled for the unexpired terms. Each commissioner shall before entering upon his duties, take and subscribe the constitutional oath of office which shall be filed in the office of the secretary of state.

§ 85. COMMISSIONER OF TAXATION AND FINANCE CUSTODIAN OF FUND

The commissioner of taxation and finance shall be the custodian of the state insurance fund; and all disbursements therefrom shall be paid by him upon drafts signed by the executive director, deputy executive director or an assistant director authorized for that purpose by the commissioners or by checks signed by one of such officers and by the commissioner of taxation and finance. He may deposit any portion of the state fund not needed for immediate use, in the manner and subject to all provisions of law respecting the deposit of other state funds by him. Interest earned by such portion of the state insurance fund deposited by him, shall be collected by him and placed to the credit of the fund.

§ 86. CATASTROPHE SURPLUS AND RESERVES FOR WORKMEN'S COMPENSATION

Ten per centum of the premiums collected from employers insured in the fund for workmen's compensation shall be set aside for the creation of a surplus until such surplus shall amount to the sum of one hundred thousand dollars, and thereafter five per centum of such premiums, until such time as in the judgment of the commissioners such surplus shall be sufficiently large to cover the catastrophe hazard. Thereafter the contribution to such surplus may be reduced or discontinued conditional upon constant maintenance of a sufficient surplus to cover the catastrophe hazard. Reserves shall be set up and maintained adequate to meet anticipated losses and carry all claims and policies to maturity, which reserves shall be computed in accordance with such rules as shall be approved by the superintendent of insurance.

§ 87. INVESTMENT OF SURPLUS OR RESERVE

Any of the surplus or reserve funds belonging to the state insurance fund may, by order of the commissioners, approved by the superintendent of insurance, be invested in or loaned on the pledge of any of the securities in which a savings bank may invest the moneys deposited therein as provided in subdivisions one, two, three, four, five, six, eleven, thirteen, fourteen, fifteen, nineteen, twenty, twenty-one and twenty-one-a of section two hundred and thirty-five of the banking law. All such securities or evidences of indebtedness shall be placed in the hands of the commissioner of taxation and finance who shall be the custodian thereof. He shall collect the principal and interest thereof, when due, and pay the same into the state insurance fund. The commissioner of taxation and finance shall pay all vouchers drawn on the state insurance fund for the making of such investments when signed by the executive director or deputy executive director upon delivery of such securities or evidences of indebtedness to him, when there is attached to such vouchers the approval of the state superintendent of insurance. The commissioners may, upon like approval of the superintendent of insurance, also sell any of such securities.

§ 87-a. INVESTMENT IN OBLIGATIONS OF THE MUNICIPAL ASSISTANCE CORPORATION FOR THE CITY OF NEW YORK; INDEMNIFICATION

1. The state insurance fund, and all state officers with responsibility for the custody or investment thereof, are authorized and directed to take any and all actions necessary or appropriate to cause such fund to make purchases as soon as possible, in accordance with a schedule to be established by the New York state emergency financial control board, but in no event later than December first, nineteen hundred seventy-five, of bonds of the municipal assistance corporation for the city of New York in the aggregate principal amount of one hundred million dollars, provided, however, that at the date of any such purchase the city of New York has not defaulted in the payment of any of its outstanding bonds or notes. The terms and conditions of such bonds, including the rates of interest thereon, shall be determined by the municipal assistance corporation for the city of New York, after consultation with the commissioners of the fund, provided such terms and conditions are found to be fair and reasonable by the New York state emergency financial control board.

2. It is hereby found and declared that obligations of the municipal assistance corporation for the city of New York are reasonable, prudent, proper and legal investments for the state insurance fund or for any state officer with custody or responsibility for the investment of the assets thereof.

3. Notwithstanding any other provision of law, including the provisions of section seventeen of the public officers law, no state officer with custody or responsibility for the investment of the assets thereof shall incur or suffer any liability whatsoever to any person beneficially interested in such system by reason of actions taken pursuant to the authorization and direction of subdivision one and such fund shall save harmless and indemnify all such officers and any investment advisors from financial loss arising out of any claim, demand, suit, action or judgment for

alleged negligence, waste or breach of fiduciary duty by reason of any investment of any monies of the state insurance fund in obligations of the municipal assistance corporation for the city of New York provided that such person shall, within five days after the date on which he is served with any summons, complaint, process, notice, demand, claim or pleading, deliver the original or a true copy thereof to the legal advisor of such system. Upon such delivery the legal advisor of the state insurance fund may assume control of the representation of such person in connection with such claim, demand, suit, action or proceeding. Such person shall cooperate fully with the legal advisor of the system or any other person designated to assume such defense in respect of such representation or defense.

4. In order to obtain the funds necessary to purchase the bonds required by this chapter, the commissioners of the state insurance fund in accordance with rules and regulations adopted by such commissioners shall have the right to borrow an amount not exceeding the obligation incurred by such fund pursuant to this chapter and to pledge as collateral therefor such assets as they may deem advisable.

§ 87-b. INVESTMENTS IN OBLIGATIONS OF THE CITY OF YONKERS; INDEMNIFICATION

1. The state insurance fund, and all state officers with responsibility for the custody or investment thereof, are authorized and directed to take any and all actions necessary or appropriate to cause such fund to make purchases as soon as possible, but in no event later than December first, nineteen hundred seventy-five, of obligations of the city of Yonkers in the aggregate principal amount of fifteen million dollars, provided, however, that at the date of any such purchase the city of Yonkers has not defaulted in the payment of any of its outstanding bonds or notes. The terms and conditions of such obligations, including the rates of interest thereon, shall be determined by the city of Yonkers, after consultation with the commissioners of the fund, provided such terms and conditions are found to be fair and reasonable by the state comptroller.

2. It is hereby found and declared that obligations of the city of Yonkers are reasonable, prudent, proper and legal investments for the state insurance fund or for any state officer with custody or responsibility for the investment of the assets thereof.

3. Notwithstanding any other provision of law, including the provisions of section seventeen of the public officers law, no state officer with custody or responsibility for the investment of the assets thereof shall incur or suffer any liability whatsoever to any person beneficially interested in such system by reason of actions taken pursuant to the authorization and direction of subdivision one and such fund shall save harmless and indemnify all such officers and any investment advisors from financial loss arising out of any claim, demand, suit, action or judgment for alleged negligence, waste or breach of fiduciary duty by reason of any investment of any monies of the state insurance fund in obligations of the city of Yonkers provided that such person shall, within five days after the date on which he is served with any summons, complaint, process, notice, demand, claim or pleading, deliver the original or a true copy thereof to the legal advisor of such system. Upon such delivery the legal advisor of the state insurance fund may assume control of the representation of such person in connection with such claim, demand, suit, action or proceeding. Such person shall cooperate fully with the legal advisor of the system or any other person designated to assume such defense in respect of such representation or defense.

4. In order to obtain the funds necessary to purchase the bonds required by this chapter, the commissioners of the state insurance fund in accordance with rules and regulations adopted by such commissioners shall have the right to borrow an amount not exceeding the obligation incurred by such fund pursuant to this chapter and to pledge as collateral therefor such assets as they may deem advisable.

§ 89. RATES FOR WORKMEN'S COMPENSATION

Employments and employees in the state fund shall be divided into such groups and classes as shall be equitably based upon

differences of industry or hazard for the purpose of establishing premium rates for workmen's compensation insurance, and for such purpose a system of merit rating may be employed which shall take account of the peculiar hazard of each individual risk. Such premiums in the state fund shall be fixed at the lowest possible rates consistent with the maintenance of a solvent fund and of reasonable reserves and surplus.

§ 90. DIVIDENDS

Policyholders insured in the state insurance fund may be divided into such groups as shall be equitable for the purpose of accounting and declaration of dividends but for the purpose of paying compensation the state fund shall be deemed one and indivisible. Separate accounts shall be kept of income and of losses and expenses incurred, including contributions to catastrophe surplus and reserves adequate to meet anticipated losses and carry all claims to maturity, for each such group. If such accounting shows a balance remaining to the credit of the group at the close of any policy period, which shall be deemed to be safely and properly so applied, there may be credited or paid to each individual member of such group such proportion of such balance as the amount of his earned premium sustains to the total earned premium of the group for the period for which the accounting is made. If any member who has withdrawn from the group would otherwise have been entitled to such a dividend, the same may be credited or paid to him.

§ 91. GROUPS FOR ACCIDENT PREVENTION

For any group established under the provisions of section ninety membership in the group of any employer otherwise entitled to be admitted thereto may be conditional upon acceptance and maintenance of special rules as to administration and as to accident prevention and medical care of employees. Such limitation of membership in the group may be established only upon proper evidence that a majority of the members of the group have approved such rules and only when such rules have been approved by the commissioners as sufficient to constitute a proper basis of differentiation as to membership in the group.

§ 94. WITHDRAWAL FROM FUND

a. Any employer may, upon complying with subdivision two or three of section fifty of this chapter, withdraw from the fund by turning in his insurance contract for cancellation, provided he has given written notice to the fund of his intention to withdraw not less than thirty days before the effective date of such cancellation. Upon receipt of such notice the fund shall, at least ten days prior to the effective date file in the office of the chairman a notice of such cancellation date.

In no event shall the insurance contract be deemed cancelled until at least ten days after the date of such filing, any earlier date mentioned in the notice to the contrary notwithstanding.

§ 99. REPORTS OF STATE INSURANCE FUND; EXAMINATION BY INSURANCE DEPARTMENT

The commissioners shall make separate reports to the superintendent of insurance concerning the state insurance fund at the same time and in the same manner as is required from mutual employer's liability and workmen's compensation corporations by section twenty-six of the insurance law, and the superintendent of insurance may examine into the condition of such state insurance fund at any time, either personally or by any duly authorized examiner appointed by him for the purpose of determining the condition of the investments and the adequacy of the reserves of such fund and such other matters as shall be in the jurisdiction of the superintendent of insurance.

APPENDIX C

STATE DECISIONAL LAW CONSIDERING THE STATUS OF INSURANCE FUNDS

Sims v. Moeur, 41 Ariz. 486, 19 P.2d 679 (1933) (trust fund primarily for employees which may not be used for any purpose not expressly or necessarily implied in act creating it).

Industrial Comm'r v. School District No. 48, 56 Ariz. 476, 108 P.2d 1004 (1941) (trust fund)

McArthur v. Smallwood, 225 Ark. 328, 281 S.W.2d 428 (1955) (funds collected from carriers and self-insureds for administration costs are trust fund not available for general State purposes)

Industrial Comm'n v. Stong, 77 Colo. 590 (1925) (en banc) (Industrial commission and state treasurer are trustees of a public trust).

Going v. Cromwell Fire District, 159 Conn. 53, 267 A.2d 428 (1970).

State v. Florida State Improvement Comm'n, 158 Fla. 743, 30 So.2d 97 (1947) (en banc) (trust fund, not property of State)

State ex rel. Williams v. Musgrave, 84 Idaho 77, 370 P.2d 778 (1962) (though funds deposited with State treasurer, they do not belong to State)

In re Opinion of the Justices, 309 Mass. 571, 34 N.E.2d 527 (1941) (amounts in fund are not part of general state revenue and may not be used for non-related purposes)

Accident Fund v. Baerwaldt, 545 F. Supp. 1030 (W.D. Mich. 1982)

Senske v. Fairmont & Waseca Canning Co., 232 Minn. 350, 45 N.W.2d 640 (1951) (fund belongs to industry, not state)

APPENDIX C
(Continued)

State ex rel. Beebe v. McMillan, 36 Nev. 383, 136 P. 108 (1913) (trust fund for employees not to be used for general government expenses)

State v. Padgett, 54 N.D. 211, 209 N.W. 388 (1926) (fund is not synonymous with State)

State ex rel. Stearns v. Olsen, 43 N.D. 619, 175 N.W. 714 (1919) (not a state fund)

Welsh v. Indus. Comm'n, 136 Ohio St. 387, 26 N.E.2d 198 (1940) (fund cannot be diverted for purpose other than those for which it was created)

Moran v. State ex rel. Derryberry, 534 P.2d 1282 (Okla. 1975) (trust funds for the benefit of employers and employees)

Sprague v. Straub, 252 Or. 507, 451 P.2d 49 (1969) (en banc) (trust fund in which State has no proprietary interest but which state holds only as "custodian")

Bennett v. State Indus. Acc. Comm'n, 203 Or. 257, 279 P.2d (1955) (trust fund not belonging to State)

House v. State Indust. Acc. Comm'n, 167 Or. 252, 117 P.2d 611 (trust fund)

Middlebusher v. State Indus. Acc. Comm'n, 147 Or. 459, 34 P.2d 325 (1934) (trust fund)

State Tax Comm'n v. Dep't of Finance, 576 P.2d 1297 (Utah 1978) (private trust fund to meet liability of employers)

Gronning v. Smart, 561 P.2d 690 (Utah 1977) (money in fund is trust fund which is not subject to appropriation to meet expenses of government)

Chez v. Indus. Comm'n, 90 Utah 447, 62 P.2d 549 (1936) (fund is not public money which may be used for and on behalf of state for a state expenditure)

APPENDIX C
(Continued)

Mason-Walsh-Atkinson-Kier Co. v. Dep't of Labor and Indus., 5 Wash.2d 508, 105 P.2d 832 (1940) (trust fund for employees)

State ex rel. Crabb v. Olinger, 196 Wash. 328, 82 P.2d 865 (1938) (trust fund)

State ex rel. Trenholm v. Yelle, 174 Wash. 547, 25 P.2d 569 (1933), *adhered to on reh'g en banc*, 174 Wash. 554, 28 P.2d 1119 (1934) (trust fund)

State ex rel. Shuff v. Clausen, 131 Wash. 119, 229 P.5 (1924) (trust fund)

Employers Insurance of Wausau v. Mitchell, 114 Wisc. 2d 592, 337 N.W.2d 857 (1983) (trust fund)

APPENDIX D

SAMPLE WORKERS' COMPENSATION POLICY

IN CONSIDERATION of the payment of the premium stated in the declarations attached to and forming a part of this policy, THE STATE INSURANCE FUND HEREBY INSURES the employer therein named as respects personal injuries sustained by his employees, including death at any time resulting therefrom as follows:

1. COVERAGE A – WORKERS' COMPENSATION: AGAINST ALL LIABILITY under Chapter 41 of the Laws of 1914, State of New York, known and cited as the Workers' Compensation Law, as amended and revised by Chapter 615 of the Laws of 1922, and all laws amendatory thereof or supplementary thereto which may be or become effective while this policy is in force, in respect of all business operations and locations conducted by this employer in New York State unless specifically excluded, and

COVERAGE B – EMPLOYERS' LIABILITY: AGREES TO INDEMNIFY this employer against loss by reason of the liability imposed upon him by Law for damages on account of such injuries to such employees wherever such injuries may be sustained;

> including the liability imposed upon him by law for damages on account of diseases, including death at any time resulting therefrom, suffered by any of such employees arising out of and in the course of the employment of such employee in a business operation of this employer covered by this policy and conducted at or from locations in the State of New York, provided that the insurance applies only if the last day of the last exposure to the conditions causing the disease occurs during the policy period and while such employee is in employment of this employer; and
>
> including the liability imposed upon this employer by reason of a suit or claim brought against him by

another to recover the amount of damages obtained from such other by an employee of the employer for injuries sustained by such employee arising out of and in the course of his employment.

EXCLUSIONS: These obligations are limited to the liability imposed by Law upon the employer for negligence, but

(1) specifically exclude any liability assumed by the employer under any contract entered into with any other person, association organization and

(2) specifically exclude any liability to provide transportation, wages, maintenance and cure in a maritime employment under the admiralty jurisdiction of the United States.

(3) Under 1. COVERAGE B assault and battery shall be deemed an accident unless committed by or at the direction of the employer.

2. LEGAL DEFENSE: THE STATE INSURANCE FUND WILL DEFEND in the name and on behalf of this employer, any suits or proceedings which may at any time be instituted against him on account of such injuries, including suits or other proceedings alleging such injuries and demanding damages or compensation therefor, although such suits, other proceedings, allegations or demands are wholly groundless, false or fraudulent, and

WILL PAY ALL COSTS taxed against this employer in any legal proceeding defended by the THE STATE INSURANCE FUND and all interest accruing after entry of judgment and all expenses incurred by THE STATE INSURANCE FUND for investigation, negotiation or defense.

3. PERIOD OF COVERAGE: THE INSURANCE under this policy is in effect at twelve and one minute o'clock A.M., Eastern Standard Time on the date stated in the declarations attached

to and forming a part of this policy, for a period of twelve months or such other period as may be stipulated by endorsement. (All inception, renewal and termination dates of this policy and any extension hereof or endorsement hereunder shall be effective as of twelve and one minute o'clock A.M., Eastern Standard Time of such date unless otherwise provided by endorsement), and

4. RENEWAL AND CANCELLATION: THIS POLICY shall automatically renew and continue in full force after the expiration of the original period of insurance, for succeeding periods of twelve months or such other period as may be stipulated by endorsement, and the employer shall be liable for the premium thereon for each succeeding period unless, in compliance with the provisions of Section 94, subdivision "a" of the Workers' Compensation Law, he shall give THE STATE INSURANCE FUND written notice of his intention to cancel not less than thirty days before the effective date of cancellation. Each renewal premium shall be payable by this employer at the beginning of each new period upon notice of the amount thereof. A policy cancelled at the insured's request at any time other than the normal anniversary date thereof shall be subject to computation and adjustment of premium for the final period in accordance with the Short Rate table adopted by THE STATE INSURANCE FUND, based on procedures approved by the Compensation Insurance Rating Board.

5. CHANGES: THIS POLICY IS ACCEPTED by the employer subject to the manual rules, classifications, rating plans and rates, adopted by THE STATE INSURANCE FUND and also subject to annual revision in accordance with such rules, classifications, rating plans and rates, with the agreement that the classifications, rates and premiums are subject to either change, correction or modification, in accordance with such manual rules, classifications, rating plans and rates. Such revision, change, correction or modification, if any, shall be expressed by endorsement indicating the effective date thereon.

6. PREMIUM: THE PREMIUM for this policy is based upon the remuneration earned during the policy period by employees

of this employer engaged in the business operations described in this policy, together with all operations necessary, incident, or appurtenant thereto or which may be connected therewith, whether conducted at or from such work places or elsewhere in connection therewith or in relation thereto. At the end of the policy period the actual amount of the remuneration earned by employees during such period shall be exhibited to THE STATE INSURANCE FUND, as provided in Paragraph 8 hereof, and the earned premium adjusted in accordance therewith at the rates and under the conditions herein specified. If the earned premium, thus computed, is greater than the advance premium paid, this employer shall immediately pay the additional amount to THE STATE INSURANCE FUND; if less, THE STATE INSURANCE FUND shall return or credit to this employer the unearned portion, but in any event THE STATE INSURANCE FUND shall retain the Minimum Premium stated in the policy.

7. RELEASE FROM LIABILITY: THE STATE INSURANCE FUND agrees that no assessment shall be levied against the employer insured under this policy, and this policy releases the employer from all liability for personal injuries or death sustained by his employees.

8. INSPECTION AND AUDIT: THE STATE INSURANCE FUND and any authorized rating board or bureau operating under the insurance laws of the State of New York designated by THE STATE INSURANCE FUND, shall each be permitted but not obligated to inspect at any reasonable time during the policy period the workplaces, operations, plants, machinery, appliances and equipment covered by this policy. Neither the right to make inspections nor the making thereof nor any report report thereon, shall constitute an undertaking on behalf of or for the benefit of the employer or others, to determine or warrant that such workplaces, operations, plants, machinery, appliances and equipment are safe.

THE STATE INSURANCE FUND and any authorized rating board or bureau as herein above described shall each be permitted to examine and audit the employer's payroll records,

general ledger, disbursements, vouchers, contracts, tax reports and all other books, documents and records of any and every kind at any reasonable time during the policy period and any extension thereof, and within three years after termination of the policy, as far as they show or tend to show or verify the amount of remuneration or other premium basis earned by employees of this employer or by others covered by this policy, or which show or tend to show the premium payable under this policy or relate to the subject matter of this insurance.

9. PARTNERSHIP/JOINT VENTURE. If the employer is a partnership or joint venture, such insurance as is afforded by this policy applies to each partner or member thereof as an insured only while he is acting within the scope of his duties as such partner or member.

10. EMPLOYER COOPERATION: The employer shall cooperate with THE STATE INSURANCE FUND and, upon the STATE INSURANCE FUND's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits or proceedings. The employer shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and other services at the time of injury as are required by the Workers' Compensation Law.

11. ASSIGNMENT: THE STATE INSURANCE FUND shall not be bound by any assignment or change of interest under this policy unless its consent shall be endorsed hereon or attached hereto signed by a duly authorized representative, and, no condition or provision of this agreement shall be waived or altered except by written endorsement attached hereto and signed by a duly authorized representative.

12. APPLICATION OF POLICY: THIS POLICY is to be construed by reference to the Workers' Compensation Law, as re-enacted and as heretofore or hereafter amended, which shall in all cases govern as to its contents and meaning.

13. EXCLUSION OF DISABILITY BENEFITS: THIS POLICY shall not apply with respect to any obligation imposed upon this employer by the Disability Benefits Law, Article 9 of the Workers' Compensation Law of the State of New York, Chapter 600 of the Laws of 1949 or by any laws amendatory thereof or supplementary thereto, for cash benefits to employees disabled as a result of non-occupational injury or sickness.

IN WITNESS WHEREOF, THE STATE INSURANCE FUND has caused this Policy to be signed by the Underwriting Director at New York, N.Y.